

STUDIES OF COMPARATIVE LAW ON
ALTERATION OF CAPITAL IN
PUBLIC COMPANIES
LIMITED BY SHARES.

Thesis for the degree of Doctor of Philosophy
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C i t a t i o n o f S t a t u t e s .

In quoting British statute law, the title and the section are given, and the citation is appended in a footnote. The titles of foreign statutes are preceded by the name of the country to which they belong, and in the case of American (U.S.A.) Law, by the name of the state.

A b b r e v i a t i o n s a n d R e f e r e n c e s .

A full bibliography is appended at the end of this study.

A list of the abbreviated titles of the works and periodicals quoted throughout the whole study is given here. When, however, they are quoted for the first time, or in a list of special literature, the titles are given in full.

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I. W o r k s .

Arminjon-Nolde-Wolff

P.Arminjon, Baron B.Nolde and M.Wolff, Traité de droit comparé, three vol., Paris 1950/52,

Berle

A.A.Berle, Jr., "Corporations and the Modern State", in : "The Future of the Democratic Capitalism" (edited by the Pennsylvania University), Philadelphia 1950,

Berle-Means

A.A.Berle and G.C.Means, The Modern Corporations and Private Property, New York 1933,

Buchanan

N.S.Buchanan, The Economics of Corporate Enterprise, New York 1940,

Buechler

H.Buechler, Erhöhung des Grundkapitals mit Ausgabe von Gratisaktien nach schweizerischem Obligationenrecht, Berne 1926,

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Bürgi	F.W.Bürgi, "Die Altengesellschaft" (forming part of the work "Das Obligationenrecht", published by Bürgi, Egger, Gutzwiller and others), Zurich 1947,
Charlesworth	J.Charlesworth, Principles of Company Law, London 1932,
Commons	J.R.Commons, Legal Foundations of Capitalism, New York 1924,
Cooke	C.A.Cooke, Corporation, Trust and Company, Manchester 1950,
Cuenet	R.Cuënet, De la réduction du capital social dans les sociétés anonymes. Droits suisse, français et allemand, Montreux 1925,
Dodd-Baker	E.M.Dodd and R.J.Baker, Cases and Materials on Corporations, Brooklyn 1951,
Escarra-Rault	J.Escarra, E.Escarra and J.Rault, Traite théorique et pratique de droit commercial. Les sociétés commerciales, Paris 1950,
Gore-Browne	Sir Francis Gore-Browne, Handbook on the Formation, Management and Winding-up of Joint Stock Companies, 41st ed., London 1952,
Gurvitch	G.Gurvitch (with a preface by Roscoe Pound), Sociology of Law, London 1947,
Hallstein,	W.Hallstein, Die Aktiengesetze der Gegenwart, Berlin 1931,
Hamburger	G.M.Hamburger, "Aktiengesellschaft", in : "Rechtsvergleichendes Handwörterbuch für Zivil-und Handelsrecht" (ed.b. F.Schlegelberger), vol. II, Berlin 1929,

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Kuhn	A.K.Kuhn, A Comparative Study of the Law of Corporations, New York 1912,
Levy	A.B.Levy, Private Corporations and their Control, two vol., London 1950,
Mueller-Erzbach	R.Mueller-Erzbach, Das private Recht der Mitgliedschaft als Prüfstein eines kausalen Rechtsdenkens, Weimar 1948,
Palmer	Palmer's Company Law, 19th ed., London 1949,
Pic-Kreher	P.Pic and J.Kreher, Sociétés commerciales, 3rd ed., two vol., Paris 1940/48,
Rauch	K.Rauch, Kapitalerhöhung aus Gesellschaftsmitteln, 3rd ed., two vol., Graz 1947/50,
Ripert	G.Ripert, Aspects juridiques du capitalisme modern, Paris 1940,
Ritter	C.Ritter and J.Ritter, Aktiengesetz, 2nd ed., Berlin 1939,
Scherrer	W.Scherrer, "Die Kapitalerhöhung bei der Aktiengesell- schaft", in : " Festgabe der Basler Juristen- fakultät zum schweizerischen Juristentag", Basle 1942,
Schmid	W.Schmid, Das feste Grundkapital der Aktiengesellschaft, Aarau 1948,
Schucany	E.Schucany, Kommentar zum schweizerischen Aktiengesetz, Zurich 1940,

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Siegwart	A.Siegwart, Die Aktiengesellschaft (forming part of the work "Das Obligationenrecht", published by Bürgi, Egger, Gutzwiller and others), Zurich 1945,
Simonson	P.F.Simonson, The Law relating to the Reduction of Share Capital, 3rd ed., London 1932,
Sorokin	P.A.Sorokin, Social and Cultural Dynamics, four vol., New York 1937/41,
Staub	H.Staub, A.Pinner, F.Bondi and H.Koenige, Kommentar zum Handelsgesetzbuch, 12/13th ed., vol.II, Berlin 1926/27,
Steiger	J.de Steiger, Le droit des sociétés anonymes en Suisse, Lausanne 1950,
Teichmann-Koehler	R.Teichmann and W.Koehler, Aktiengesetz, 3rd ed., Heidelberg 1950,
Thompson	S.D.Thompson, Commentaries on the Law of Private Corporations, seven vol., San Francisco 1895/99,
Toynbee	A.Toynbee, A study of history, vol. VII - X , London 1954,
Wilton	G.W.Wilton, Alteration of the memorandum of association, Edinburgh 1927,
Zingg	B.Zingg, Der Gläubigerschutz bei der Herabsetzung des Grundkapitals, Aarau 1940.

A b b r e v i a t i o n .

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II. P e r i o d i c a l s.

CLR	Columbia Law Review,	New York,
G	Gruchots Beiträge zur Erläuterung des deutschen Rechts,	Berlin,
HLR	Harvard Law Review,	Cambridge (Mass.),
ICLQ	International and Comparative Law Quarterly,	London,
JCL	Journal of Comparative Legislation and International Law,	London,
LQR	Law Quarterly Review,	London,
MLR	Modern Law Review,	London,
SLR	Scottish Law Review,	Glasgow,
SLT	Scots Law Times,	Edinburgh,
TLR	Tulane Law Review,	New Orleans,
YLJ	Yale Law Journal,	New Haven,
ZHR	Zeitschrift für das gesamte Handels- und Konkursrecht,	Stuttgart,
ZsAIP	Zeitschrift für ausländisches und internationales Privatrecht,	Berlin,
ZSR	Zeitschrift für schweizerisches Recht,	Basle.

A b b r e v i a t i o n .

R e f e r e n c e .

III. Miscellaneous abbreviations.

A	The pages of the Annexes, e.g. A 23,
AG	The German Companies Act of 1937,
Art.	Article,
C.A.	Companies Act (British),
Cmd.	"Command of Government Papers",
C.O.	Swiss Code of Obligations,
DM	"Deutsche Mark", German currency since 1948,
F.	French,
G.	German,
HGB	German Commercial Code of 1897,
HMSO	Her Majesty's Stationery Office,
It.	Italian,
RM	"Reichsmark", German currency 1923 - 1948,
S , Ss,	Section, sections,
s.a.	"sine anno", year of publication not mentioned,
SF.	Swiss French,
S.Fr.	Swiss currency units,
SG.	Swiss German.

P r e f a c e .

This study is concerned with the problem of a l t e r a t i o n of capital in public companies limited by shares. It is exclusively a study of comparative law, and the confinement of the subject to p u b l i c c o m p a n i e s limited by shares has been imposed only in order to facilitate the comparison. There is practically no difference between public and private companies in Scots and English Law in respect of the alteration of capital, but the difference is growing enormously in other systems of law, where private companies are usually regulated by separate legislative acts, and very often bear a quite different "trade.name" of their own. Thus, for example, the German institutions of G.m.b.H. and Kommanditgesellschaft auf Aktien, the Brazilian sociedade por quotas de responsabilidade limitada, the Italian Società anonima per quote, and their counterparts in other countries are excluded from this study¹.

The term "limited company" is used throughout to denote a public company limited by shares, the other types of limited companies not being included in this study. When using the term "private corporation", the whole group of capitalistically organised "commercial associations" is meant ; but when the latter term is used, I intend to include partnership and similar types of association in my discussion.

1. Cf. W.Hallstein, "Die Gesellschaft mit beschränkter Haftung in den Auslandsrechten verglichen mit dem deutschen Recht", in : "Zeitschrift für ausländisches und internationales Privatrecht", vol.12, Berlin 1939, pp. 348 ff, and p. 354 ; and Ph. de Sola Canizares and H.Aztiria, Tratado de Sociedades de Responsabilidad Limitada, vol. I, Buenos Aires 1950, pp. 3-7.

In principle, I shall also confine myself to the youngest branch of company law, i.e. to those companies which were incorporated by registration under the Companies Acts, and which accordingly came into being after 1844. Nor is it my intention to attend to the special problems of public corporations, i.e. state-owned corporations, and statutory, chartered and cost-book companies¹, although they are theoretically forms of company that should be included in the framework of a study of public companies. But since these problems tend to become a special branch of company law, they are generally omitted here².

Further, I intend to deal not only with alteration of capital, but also with some of the problems of alteration in capital, i.e. alteration which does not involve an alteration of the total amount of the capital. On the other hand, problems of alteration of capital in connection with a change in the legal form of the company, say, from "unlimited" to "limited", or from "limited by guarantee" to "limited by shares", - the problems of a final repayment of capital in the case of a winding-up of a company, and any type of change of capital in connection with amalgamation or reconstruction, are excluded from this work.

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1. L.C.B. Gower, The principles of Modern Company Law, London 1954, pp.6 ff.
 2. M.S.Culp, "Creation of Government Corporations by the National Government", in : "Michigan Law Review", vol.33 (1935), pp.473-511; O.P.Field, "Government corporations: A proposal", in : "Harvard Law Review", vol.48 (1935), pp.775-796 ; S.Reed, T.W.Palmer and L.B.Wehle, "Government-Controlled Business Corporations: a symposium", in : "Tulane Law Review", vol. 10 (1935), pp.79-101 ; and L.B.Wehle, Government controlled business corporations in America and Europe, Washington 1935.

Similarly debentures, since they are not part of the capital, are also excluded ; but the survey of the so-called p r e - e m p t i v e rights (using this term of American doctrine throughout the work) is extended to those pre-emptive rights which are owned by debenture-holders.

This study is undertaken from the point of view of c o m p a r a t i v e l a w not only to widen the observation of trends, and not only to investigate possible impacts of one legal system upon another, - but also to present factual material illustrative of this particular problem of company law ¹. Although it might seem at first glance that the "segment" of company law chosen for this study is a very narrow one, it is nevertheless quite impracticable to make a universal survey even here, and the law of only a dozen countries, eleven of them European, has been selected for detailed analysis. Thus the chapter comprising individual surveys of the relevant law of different countries is sub-divided accordingly, and the law of other countries is mentioned only as the need arises. I shall also leave aside completely Soviet Law, and the sovietised law of the countries behind the Iron Curtain, regardless of whether their status has been recognized de jure by this country, although the Soviet Law on joint stock companies re-

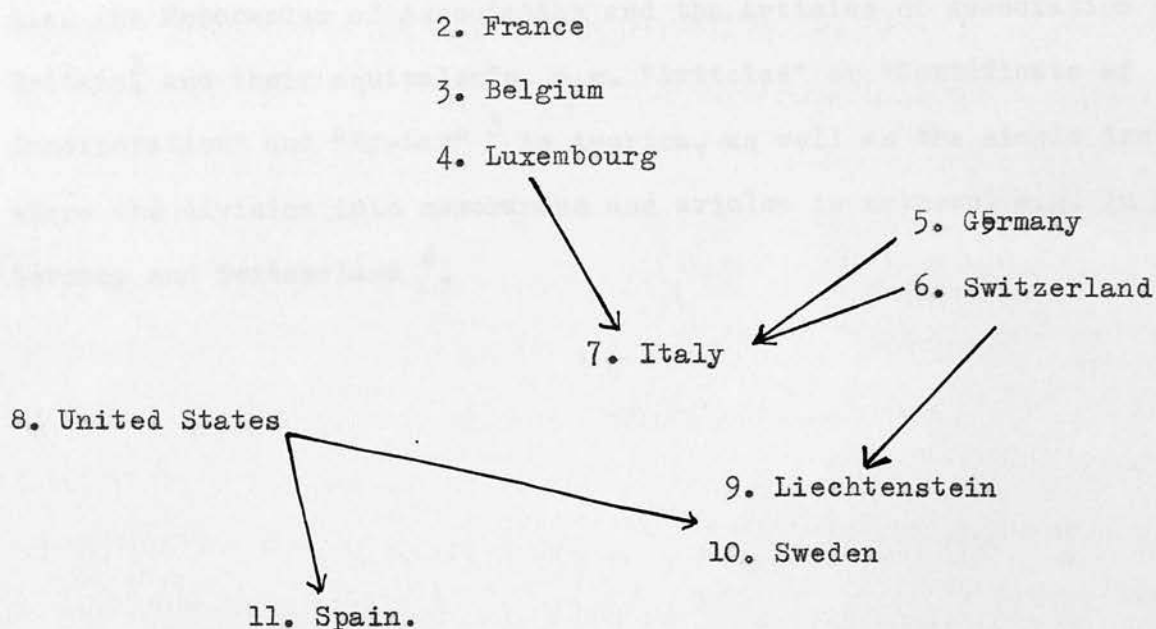
1. Any study of comparative law is apt to draw on sources which are more in the nature of "text-books" and "jurists' articles" than "case-books" and judicial decisions.

mains on the statute books of the Soviet Union¹. I shall, however, in a few cases mention the pre-soviet law of Baltic countries and other countries that are now under Soviet influence.

The first individual survey is on Scots and English Law, thus serving as an initial point in the chapter comprising such surveys of various legal systems. It is rather difficult to find a good solution for the order of study of the other ten systems of law. Neither a grouping of Common Law countries together, and of those of the European continent apart, subdividing them perhaps according to their history into Germanic and Romanic countries, nor a treatment

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1. The practice of issuing governmental licences for organisation of such joint stock companies was discontinued a long time ago (since about 1927). Cf. V.Gsovski, *Soviet Civil Law*, Ann Arbor (Mich.) 1949, vol.2, p.187. To mention only one example : the joint stock company Sovtorgflot existed as such a company from 1926 to 1931, when it was reshaped as a "federal association". Similarly, the joint stock company Sovfracht was reshaped as a "federal association" in 1930. Cf. A.D.Keilin, *Sovetskoye Morskoye Pravo*, Moscow 1954, pp.32 and 43. Even these joint stock companies of the late twenties had never been formed in the Soviet Union but as state enterprises, all shares being held by the state or its state autonomous corporations. Cf. P.Arminjon, Baron B.Nolde and M.Wolff, *Traité de droit comparé*, vol.III, Paris 1952, p.310, and A.Krimmer, *Sociétés des capitaux en Russie imperiale et en Russie soviétique*, Paris 1934. This is the reason why Soviet Law is not included in this study. Besides, even if it were not a mere dead letter of the statute book, to compare it with Western Law would be impossible owing to the different economic backgrounds, and their incompatibility, due in part to the reduced amount of legal ability of the Soviet citizen. Cf. M.Čakste, "Das persönliche Eigentum des Sowjetbürgers", in : "Osteuroparecht", vol.1, Stuttgart 1955, pp.27 ff. For similar reasons apparently F.de Sola Canizares omitted the Soviet countries in his recent study on "The Rights of Shareholders", in : "International and Comparative Law Quarterly", vol. 2, London 1953, pp.564 ff. It is, perhaps, still too early to express an opinion whether the recent "thawing" in Soviet countries may mean an increase of legal ability in their citizens, and whether that may lead to a genuine revival of company law.

in
of all these countries in a purely chronological, or any geographical
order, would be satisfactory. The impacts of one legal system upon another,
and the various degrees and styles of their interdependencies appear to be
so complex that it seems to be almost impossible to find an ideal order in
which the danger of anticipation of some comparisons would be least. I
would submit therefore, without any pretence to a solution that would
satisfy everybody, the following order of treatment of these ten countries:



I tried to indicate by this grouping of these countries their
respective affinities one to the other ¹, and this placing of the material
would minimise the possibility of anticipation of legal sources which would
be dealt with only in one of the subsequent surveys. Italian Law, though
traditionally akin to French Law, is treated later, since in this case the

1. The number indicate the order of treatment.

impact of modern German and Swiss Law is obvious. The Laws of Sweden and Liechtenstein, though Germanic in many respects, could not be placed on the list before American Law, since both of them were written one eye firmly fixed upon American Law. They belong also to different jurisprudential generations, the latter being senior to the former ¹. Spanish Law, as the cadet of the family, has to bring up the rear.

The term "charter" is used in the sense of the document of constitution of a company, and covers both the case where there are two such documents, i.e. the Memorandum of Association and the Articles of Association in Britain,² and their equivalents, e.g. "Articles" or "Certificate of Incorporation" and "By-Law" ³ in America, as well as the single instrument where the division into memorandum and articles is unknown, e.g. in France, Germany and Switzerland ⁴.

1. Cf. infra p. 254.

2. The term "deed of settlement", used prior to 1856, bifurcated into "memorandum" and "articles" only in the Joint Stock Companies Act of 1856 (19 and 20 Vict., cap. 47). Cf. C.A. Cooke, Corporation, Trust and Company, Manchester 1950, p. 158, and W. Hallstein, Die Aktienrechte der Gegenwart, Berlin 1931, p. 117. In the Companies Clauses Consolidation Acts of 1845 the term "special act" was used to denote : " ... any Act which shall be hereafter passed incorporating or constituting a Joint Stock Company". Cf. J. Charlesworth, The Principles of Company Law, London 1932, p. 262, and G.W. Wilton, Company Law and Practice in Scotland, Edinburgh 1912, p. 614.

The terms "memorandum" and "articles" were practically unknown in 1845.

3. Cf. infra pp. 214-215, and p. 223, note 7.

4. H.W. Goldschmidt, English Law from the foreign standpoint, London 1937, p. 170.

I. Introduction.

"The meaning of corporation, like the meaning of property and liberty, has been changing during decades and centuries" ¹. And undoubtedly there is some ambiguity ² about its meaning, for its nature has always been hybrid. At one time it appears to be an association of human beings, at another time a persona, i.e. a legal mask concealing human beings. Again, we find it as a separate body not to be identified with its members, and at another time a mere dummy concealing the content, the base, the common interest and the acts of its members. This elastic ability to change shape, this privilege of being a "convenience", as Roscoe Pound ³ is supposed to have said, may well have been considered to be its leading characteristic some thirty years ago : but since then the "centre of gravity" has moved over in remarkable fashion from private law to public law. The ability to change shape has decreased. Instead of companies possessing the privilege of being a "convenience", we may trace signs of its becoming a public burden to be a public company ⁴. Membership as a relation between shareholders and the legal entity tends to diminish,

1. John R. Commons, Legal foundations of Capitalism, New York 1924, p.291.

2. Georges Ripert, Aspects juridiques du capitalisme moderne, Paris 1946, p.93.

3. Commons, p.292.

4. Historians assert sometimes that it may happen quite often that former privileges turn to be burdens. Cf. Arnold J. Toynbee, A study of history, vol.IX, London 1954, pp. 554, note 2.

and to touch a much smaller field of operation, leaving the "loin's share" of management and influence to the inner circle of the leading officers.

The institution of corporations is, legally and sociologically, undergoing a never-ceasing transformation. This transformation becomes apparent in all branches and forms of the institution, but, naturally, it becomes more apparent where several changes occur together. Such changes cannot be studied in complete isolation from one another, but it is beyond the scope of this study to present a picture of all the developments in the whole institution of public companies.

Historically, the hybrid nature ¹ of limited companies stems from the mixture of two different elements : elements originating in the Roman Law institutions of corporatio and societas , and the elements originating in Germanic sources. This mixture has become the main type of capitalistic enterprise ², with a system of contracts in the background.

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1. There is, in fact, hardly any institution that could claim to be absolutely monogenous; and claims of monogenosity indicate generally an extreme selfcentredness, as much as a stress of the hybridity sometimes indicates lack of initial basis.
 2. The continental jurisprudence knew for about a hundred years the subdivision of trading or commercial associations, or corporate enterprises, into "capitalistic" and personal associations. Public and private companies were usually attributed to the "capitalistic" associations, partnership to the personal ones. All types of commercial associations (F.: "sociétés commerciales") and all single merchants (F.: "commerçants individus", G.: "Einzelkaufleute") bear together the legal quality of traders or merchants. This legal concept was known in this country in the times of Law Merchant. W.Bowstead ("The Commercial Laws of the World", vol.24, part I) translated the term "Handelsgesellschaften" by "trading associations". Cf. op.cit., p. 78, p. 82, note 1, and p.107.
Cf. Arminjon-Nolde-Wolff, vol.II, pp. 175, 228, 414-415, 540-541; Ph.de Sola Canizares and H.Aztiria, Tratado de Sociedades de Responsabilidad Limitada, vol.I, p.20; R.Fischer, "Die Personenvereinigungen", in : "Handbuch des gesamten Handelsrechts", (ed. by V.Ehrenberg), vol.III, part I, Leipzig 1916, pp.1-11; P.Gieseke, "Das Wesen der Kapitalgesellschaft", in : "Deutsche Landesreferate zum III Internationalen Kongress für Rechtsvergleichung", Tübingen 1950, pp.622 ff.; H.Würdinger, Kommentar zum Handelsgesetzbuch, 2nd ed., vol.II, Berlin 1953, pp.133 ff.

Though it might seem at first that the conception of a limited company as a legal entity, or as the French say, a personnalité morale, would facilitate modification of the charter and an alteration of the capital ¹, this has not proved to be the case. One of the most fragile features of this hybrid was just the inconsistency between the separate legal personality and anonymity ² of the company on the one hand, and the ~~in~~ability to alter and amend the charter on the other hand. The impossibility of foreseeing the development of economic conditions and the actual needs of the company, and the ~~the~~ inflexibility of the constitution of the legal body revealed almost at once its weak point. The created legal shell of the limited company, so very much acclaimed urbi et orbe as an unsurpassed achievement of legal architecture, proved almost at once to be lagging behind life and the requirements of economic reality ³.

The elements of partnership were initially so strong in the basic

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1. R.Cuénét, De la réduction du capital social dans les sociétés anonymes, Droits suisse, français et allemand, Montreux 1925, p.32.
 2. Anonymity, the quality of remaining unknown, is as regards commercial associations the quality of hiding the human beings behind the screen of the legal entities and their officers.
Cf. P.Gieseke, "Das Wesen der Kapitalgesellschaft", p.635.
 3. Louis Jasserand, "Comment les textes de loi changent de valeur au gré des phénomènes économiques", in : "Etudes de droit civil à la mémoire de Henri Capitant", Paris (s.a., 1939), pp.369 ff.

structure of limited companies¹ that the rigour and strength of the civil law's demands concerning the binding force of contracts dominated the life and physiology of the legal entity embodied as a limited company. Only with time did the requirements of practical life teach the jurists to seek in the quality of a separate unit the answer to the quest for a more elastic form. The stress was changing from the personal to the corporative,² from the contract to the charter. So long as the contract between the shareholders, and between the shareholders and their company, and between the shareholders and the state³ dominated the whole situation, so long as these contracts were not yet wholly covered by the charter, the principles of civil law were in the foreground. Since the stress has now moved towards the public and formal, different principles of interpretation emerge. Where the duality of civil and commercial law exists, the latter is taking the lead and overshadows the background of civil law.

One of the reasons why this element of company law, i.e. alteration of capital, was chosen as the subject of a more detailed study, was its

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1. Cf. N.Lindley, A treatise on the Law of Partnership, including its application to Joint-Stock and other Companies, two vol., London 1860; and Sir Nathaniel Lindley, W.B.Lindley and W.C.Gull, A treatise on the Law of Companies considered as a branch of the Law of Partnership, 5th ed., London 1889.
The first mention of the possibility of a reduction of capital (cf.infra p.66, note 3, p. 71, and pp. 87 ff.) was at that time interpreted as "an assimilation to the principles of private partnership". Cf. "Law Times", vol.64 (1877),p.41.
 2. P.Pic and J.Kreher, Des societes commerciales, vol.I, Paris 1940, p.194.
 3. This "trefoil" of contractual relations dominated American doctrine on private corporations for a very long time. L.C.B.Gower ("Some Contrasts between British and American Corporation Law", in : HLR, vol.69, pp.1371 and 1380) is, however, of the opinion that, except concerning the pre-emptive rights, English legislature and courts have relied on partnership principles to a much greater extent than have the American.

proximity to the most essential element of this type of private corporations. Since they are the most "capitalistic" ¹ of all corporations, the problem of the amount, forms and flexibility of this capital is really important, especially in view of the fact that this capital is more easily attacked by the creditors than its reserves ². Its interdependency with the problem of structural transformation of "capitalism" ³ itself, its relationship with the problem of membership, and, last but not least, the fact that this is one of the most intricate and widely spread problems of contemporary company law, suggested that it was ripe for a more detailed study ⁴. If "capitalism" appears to be a singularly malleable institution ⁵, so are per excellence all legal institutions based on or derived from capitalism. If capitalism has changed, and may change further (since no live thing or phenomenon is able to escape from change), all such changes have to be considered as natural, and on the whole as "healthy". Any achievement bears in itself the nucleus of its destruction. The values of commercial life are transitory. On the contrary

1. Cf. supra p.15, note 2.

2. A.Siegwart, "Die Aktiengesellschaft", in "Das Obligationenrecht" (published by Bürgi, Egger, Gutzwiller and others), Zurich 1945, p.380.

3. Among the vast literature on this subject I would like to mention only : G.Pirou, *La crise du capitalisme*, 2nd ed., Paris 1936(cf. especially pp.163 ff.), and the collective study : "The Future of Democratic Capitalism" (published by Pennsylvania University), Philadelphia 1950.

4. J.Escarra, E.Escarra and J.Rault, *Traité théorique et pratique de droit commercial, Les sociétés commerciales*, vol.I, Paris 1950, p.40.

5. A.A.Berle, Jr, "Corporations and the Modern State", in : "The Future of Democratic Capitalism", Philadelphia 1950, p.55.

- law lags behind life, and this lagging behind is inseparable from and immanent in the institution "law" itself, just as the diversity and temporality of its phenomena are an essential part of any life.

It is typical of all private corporations, and only of them, that there exists some duality, and even, perhaps, some ambiguity between the notions "capital" and "assets" ¹, unknown to the other commercial associations. We may have the impression that this duality of these notions "capital" and "assets" should disappear where the difference between corporations and partnerships as units of business life and forms of corporate enterprise does not exist ², or, although existing initially, as soon as this difference diminishes. Some German authors thought that this could be achieved, perhaps, by stressing the structure of the limited company as a legal entity, or a body-of-its-own, and by trying to forget that the membership or "shareholdership" is still its basis, thus putting all types of business enterprise on the same footing. But that is apparently not so.

The difference originates not in the quality of being a legal entity, not in the oddness of a limited company in comparison with the so-called

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1. K.Rauch, Kapitalerhöhung aus Gesellschaftsmitteln, vol.I, Graz 1947, pp. 1 ff.; and W.Schmid, Das feste Grundkapital der Aktiengesellschaft, Aarau 1948, p.141.
 2. E.g. in French, Italian and Scots law.
Cf. infra p. 67 and note 1.

personal associations ¹ like partnership, but in the legal regulations prohibiting the public companies from acting on the same footing as individual traders or single merchants ², or personal associations, especially in countries where the principles of ultra vires are dominant. Apparently, the state is strongly disinclined to treat them on the same footing ³, and therefore applies the principles of jus cogens to them much more strictly than to partnerships ⁴. This again applies in a greater extent to public companies than to private ones ⁵. Thereafter, the difference may be found to lie in the winding-up formalities, in the restrictions concerning the amount of dividends payable to the shareholders, in the restrictions concerning the creation of undisclosed or secret reserves, and, last but not least, in the restrictions on alteration of capital, the sum considered by some systems of law as having the quality of a fund for indemnifying the creditors.

1. Cf. supra p. 15, note 2.

2. I.e. merchants trading without partners and without formation of a company.

3. An opposite point of view was expressed by G.W.Wilton (Company Law, Principal distinctions between the Laws of England and Scotland, London 1923, p.22), who reproaches apparently the state in saying : " It does not seem right that companies should be allowed to trade in England in a way not open to the individual trader".

4. An American controversy about this question appears in C.Magruder's article:"A note on partnership liability of stockholders in defective corporations", in :HLR, vol.40 (1927), pp.735-751. Another famous American contribution to this question was an article by W.N.Hohfeld ("Nature of Stockholders' Individual Liability for corporate debts", in : "Columbia Law Review", vol.9, New York 1909, pp.285-320, reprinted in W.N.Hohfeld's legal essays : Fundamental Legal Conceptions, New Haven 1923, pp. 197-200, and notes 9-14).

5. W.Scherrer, "Die Kapitalerhöhung bei der Aktiengesellschaft", in : "Festgabe der Basler Juristenfakultät zum schweizerischen Juristentag", Basle 1942, p.60 (also published as a separate book in the series "Basler Studien zur Rechtswissenschaft").

But, perhaps, the real reason for a different attitude to and for a different interpretation of the notion "capital" for limited companies lies not so much in the fact of "membership" as a basis (since partnership and other personal associations have also their "membership"), but rather in the more intense interest of the state in this category of units of enterprise, the "upper" class of the state's economy.

It is generally assumed that p u b l i c companies are one of the forms of p r i v a t e c o r p o r a t i o n s. A more close investigation, however, reveals that they bear this epithet "public" with justification, for they are, in fact, more subject to the impact of the p u b l i c element than any other form of corporate enterprise ¹. In so far as law is concerned, they are enterprises run for private profit, and thus are the typical representatives of the so-called "monopoly capitalism" ², and there seems to be no legal obligation on this or that company to act in any other way besides that which would seem advantageous to its private interests. Nevertheless, one may assert that more than any other type of company, they not only follow in practice the national and public economic interests, and serve as a medium of national policy, but they exist under a certain strain that they "ought not operate for the sole purpose of making profit for their shareholders" ³.

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1. Lord Greene said in In re Smith and Fawcett Limited (116, L.T.Rep., 279) that private companies (though being separate entities in law as much as the public companies) are much more analogous to partnerships, especially from the point of view of business and personal relationship. Cf. also : "The Law Times", vol. 216 (1953), p. 640.
 2. Berle, pp. 45 and 36.
 3. L.C.B. Gower, "Corporate Control : The battle for the Berkeley", in : HLR, vol. 68 (1955), p. 1190, note 51, and p. 1191 ; and L.C.B. Gower, "Some Contrasts between British and American Corporation Law", in : HLR, vol. 69 (1956), p. 1375. The trend towards state intervention in matters of business was noted by Dicey. Cf. Cooke, p. 179.

There are signs that lead one to the conclusion that the community of members or shareholders is no longer an essential element of a public company, or, at least, does not feature to the same extent as previously, and the accent on membership, so well known in partnership, is not nearly so pronounced as heretofore.

The ideas of "authorized capital", and of "voteless preference shares, and, although in the opinion of only some authors, of "no-par-value shares"¹ have fundamentally disrupted the close contact that had initially existed between member and share in the capital. This process of disruption continued when the idea started to gain ground that the contributions of the shareholders were not the only way of assembling the capital of a limited company. An increase of capital out of surplus is one of the other ways. One has to remember also that the court has nowadays acquired the right to amend the charter even against the wish of the shareholders.² The possibility of "no-man-companies"³ is the next step in this line of development⁴. The idea

1. E.g. J.C.Bonbright, W.W.Cook and other American authors.
Cf. also infra pp. 32 and 284-285.

2. Cf. infra pp.109-110.

3. This possibility was still energetically denied in the late twenties by the American jurist E.M.Dodd, Jr. ("Partnership Liability of Stockholders in Defective Corporations", in HLR, vol.40, pp.523-525).
This development is now apparent, and not only in all public corporations created as a result of a nationalization to exploit the nationalized sector of the national economy, but also, though, may be, to a lesser extent, in cases where one speaks about a "self-perpetuating control or management". Cf. E.M.Dodd and R.J.Baker, Cases and Materials on Corporations, 2nd ed., Brooklyn 1951, p. 909.
Professor L.C.B.Gower ("Corporate Control : The battle for the Berkeley", in : HLR, vol.68, p.1192 and note 60, and "Company Directors and Take-over Bids", in : "The Listener", vol.55, p.21) mentions the appointment of the trustees of a Staff

Pension Fund by the board of directors as an effective act of re-insurance.

4. Cf. infra p. 26.

that membership could be destroyed by a reduction of capital ¹ without consent, even, perhaps, without consultation with the member, somehow contradicted our basic conception of the mutual relations between members and the body that was built up by them. The terms "member" and "shareholder," once synonymous, are tending now to acquire different meanings ².

The voting rights of a shareholder are generally considered to be one of his rights that are basically rooted in his status as a member of the company, but recent development shows more and more that a disruption has taken place. One needs only mention here the voteless preference shares ³. "Membership" and "shareholdership" have with time grown so far apart in meaning ⁴ that it is sometimes difficult to imagine that these conceptions were not so very long ago generally regarded as almost identical, these

1. Schmid, p.109 and note 15.

2. R.Müller-Erzbach (^{"Das private Recht der Mitgliedschaft als Prüfstein eines kausalen Rechtsdenkens"}, Weimar 1948, p.90) asserts that it is simply the fixation of the "membership" to a sum of money that marks the first divergence between "membership" and "shareholdership". Siegwart (p.159) said that a minimum of voting rights was an essential of "membership", but he thought that since the appearance of voteless preference shares one should try to find a new notion to replace the old obsolete idea of "membership".

3. A.B.Levy, Private Corporations and their Control, London 1950, pp.255, 300, 562, 577 and 649-651 ; and R.Teichmann and W.Koehler, Aktiengesetz, Heidelberg 1950, pp.249 ff.

4. This development at first appears, although very vaguely, to have been noticed by some Swiss jurists (cf.e.g.R.Cuènet, pp.33 and 44). So did the Scots jurist A.C.Bennett also in one of his remarks (in : "Scots Law Times", News, Edinburgh 1936, p.70). It was later the subject of a special study by R.Müller-Erzbach (op. cit.). Cf. infra p. 155, note 1.
It should also be noted that in French jurisprudence and legal nomenclature the position has almost been reached where "member" ("associé") is rather used in the case of partnership and similar personal association, but "shareholder" ("actionnaire") in the case of public and private companies and similar corporations.
Cf. Escarra-Rault, vol.I, pp.571-572 ; vol.II, p.56 and pp.473-474.

terms being used quite interchangeably. They are not, however, receiving quite different meanings, the first one denoting a personal relationship, the second an obligation. "Membership" is tending to degenerate into a titular position with almost no content at all ¹ ; "shareholdership" is tending to expand and to cover areas which not so very long ago were considered to be purely referable to membership.

Membership has become an unmeasurable conception, and in cases of an exchange of shares, or an increase of capital, or a renunciation of pre-emptive rights, one is more and more ceasing to speak about "partial or total extinction of membership", about "diminishing of membership", about "replacement of an old membership by a new one". These terms belong to the past. If "membership" is now a mere principle, the next step in this direction may be that in the structure of public companies this notion may become optional.

Reference to the members of a projected alteration of capital that leads to an alteration in the amount of shares through increase or reduction of capital, may still exist in the form of a general meeting

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1. E. Müller (*Kapitalherabsetzung bei der Aktiengesellschaft*, Berne 1938, p. 19) expands the idea that the notion "membership" becomes brittle in the course of time, especially when the amount of rights formerly attached to "membership" and described as droits acquis is gradually diminishing. Scherrer (p. 48, b) gives another good example of such a degeneration into a position of a "mere"-membership (G. : " ..blosse Mitgliedschaft").

where the members are asked to act as the supreme sovereign organ of the company. But this does not necessarily happen, since one may visualize the possibility of such a decision w i t h o u t the obligatory activation of the general-meeting-apparatus : not only in the case of an increase of capital within the limits of an authorized capital, not only in the form of a collecting of the written assent of a certain number of shareholders instead of summoning of a general meeting ¹, but also in the cases of a revaluation of capital in connection with a currency reform, or the transfer, to another state , of territory with all the companies domiciled there.

There is a fairly large amount of psychology in the relationship between shareholders and the company to which they belong. In earlier stages of development they considered themselves as co-proprietors ² of the enterprise, and one still finds this attitude in family businesses, where the legal entity is only a method of disguise, merely an easily seen-through mask. This applies generally to private companies ³ and their

1. Cf. infra pp. 226 and 278.

2. The expression "the shareholders are the owners" can still be found in popular usage. Cf. e.g. Dodd-Baker, p.904 ; and L.C.B.Gower, "Company Directors and Take-over Bids", in : " The Listener", vol.LV, London 1956, p.20.

3. It is curious to note that the fact that it is impossible to issue share warrants in p r i v a t e c o m p a n i e s markedly diminishes their anonymity. This is, once more, a sign of a growing gulf between these two types of private corporations.

Cf. F.W.Bürgi, "Die Aktiengesellschaft", in : "Das Obligationenrecht" (published by Bürgi, Egger, Gutzwiller and others), Zurich 1947, p. 49 ; and Charlesworth, p. 112.

counterparts on the European continent ¹. In the case of public companies we are far away from this attitude, since the psychology of co-proprietorship has been superseded by that of investorship ². There are also found even more extreme examples of this development, where bodies legally shaped as public companies do not possess an understructure of membership, "shareholdership" or similar institution in the traditional style, as e.g. nowadays in companies owned either by the Government, or by municipalities, or by other public bodies, or with all shares belonging in trust to the same legal entity, or all shares belonging to a single person.

It is beyond the scope of this study to consider over the relationship between law, jurisprudence, philosophy and sociology. I would like to refer in this connection to the studies of Prof.G.Gurvitch ³, Prof.Roscoe Pound ⁴ and Prof. N.S.Timasheff ⁵, and merely mention the lesser known

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1. This applies even more to a certain few foreign companies where we find a legal entity with the institution of membership shaped on the lines of a limited company, but with a legally recognised co-proprietorship in some of the property or real estate exploited by the company, as e.g. in the cases of Chilean "mining companies", the German "Gewerkschaft" and the Latvian "shipping associations". Cf. G.M.Hamburger, "Aktiengesellschaft", in : "Rechtsvergleichendes Handwörterbuch für das Zivil-und Handelsrecht" (ed.by F.Schlegelberger), vol.II, Berlin 1929, pp. 446, 454, 484.
 2. Even theorists of accounting are starting to assert that ownership of capital is somehow being reduced to a secondary role in limited companies. Cf.F.Sewell Bray, Four Essays in Accounting Theory, London 1953, pp. 44 f. My attention to the works of this scholar was drawn by Professor A.G.Murray, of Edinburgh University, to whom I express my gratitude.
 3. G.Gurvitch, Sociology of Law, London 1947. Cf. infra p. 29, note 3.
 4. R.Pound, "Sociology of Law" in : " Twentieth Century Sociology" (ed. by G.Gurvitch and W.E.Moore), New York 1945.
 5. N.S.Timasheff, An Introduction to the Sociology of Law, Cambridge (Mass.) 1939.

theories of the American Chief Justice B.N.Cardozo ¹ (1870-1938) and the Russian Professor W.I.Sinaiski ² (1876-1949).

The amounts of pragmatism and theorizing may be compounded differently in different countries. One generally speaks about the "happy pragmatism" of the Anglo-Saxons, and it is usually assumed that the British attitude is of a strictly practical character ³, as that may be tested e.g. by the British attitude to problems of Constitutional Law, and even to the notion of "constitutionality" ⁴. The general psychology of a particular people

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1. B.N.Cardozo, Growth of the Law, New Haven 1927 ; Nature of Judicial Process, New Haven 1928 ; The paradoxes of legal science, New York 1928 ; Law and Literature, 3rd ed., New York 1934 ; Selected writings, New York 1947.
See a witty remark on his theories by the American jurist E.M.Dodd, Jr., "Dogma and Practice in the Law of Associations", in : HLR, vol.42, pp.977-1014.
 2. Sinaiski tended to accentuate the juridical approach, centring his study around the artificial figure of the "civil-law-community", or, the "society" of people living under the same civil law. Thus, the Scots and the English "civil-law-communities" would have been two entirely different units in his research into the inter-relationship between civil law and sociology. In comparison with the genetic sociology of Gurvitch (cf. pp.49 and 227), who, analysing by means of "dynamic macrosociology", studied the tendencies and factors of changes, developments and decays of the law of particular types of society, the theories of Sinaiski, though also "macrosociological" in some respects, were rather static, studying the sociological behaviour of individuals as seen through the prism of patterns and symbols of the civil law of that country.
His main works were : Rome et son droit théocratique et laïque considérés au point de vue de la mythologie, de l'historiographie et de l'histoire, Riga 1928 ; Abhandlungen zur Theorie und Geschichte des Zivilrechts, Riga 1930 ; Théorie de la chronologie ancienne civile et naturelle, Riga 1931 ; Identité des lois et base chronologique de l'histoire romaine, Riga 1932.
 3. There are, however, signs that an appreciation of ideological aspects and an awareness of ideas acquired exclusively, or almost exclusively, by a theoretical approach are increasing.
Cf. e.g. E.Shonfield, "The end of the laissez-faire", in : "The Listener", vol.IV, London 1956, pp. 163 ff. ; and Peregrine Worsthorne, "Democracy v.Liberty", in : "Encounter", vol. VI (1), London 1956, pp. 8 ff. The latter even points out that a one-sided practical approach might be a "dangerous indulgence".
 4. It is worth while noting that the Scottish reaction is nowadays slightly less practical, since, as seen in the case Mac Cormick v. Lord Advocate, 1953, S.C., 396, a discussion on the "constitutionality" of Acts of Parliament is still conceivable. Cf. infra p. 50, note 2.

may influence not only the amount of pragmatism in their general attitude and behaviour, but also the style of their civil law. On the other hand, civil law may influence the psychology of that people too. According to Gurvitch and other sociologists of law, it is impossible to deny that collective spiritual values (e.g. law) and ideas have their own functional relations with the social structure and the historical background of a society ¹. The Swedish scholars Hägerström and Lundstedt moved in an opposite direction. Stressing the metaphysical and imaginative side of jurisprudence, they denied the possibility "scientific" or scholarly approach to "ideas" that we may have on legal matters ², and implicitly denied the possibility of an "ideological" approach to all. The relations between ideas and the social structure of a society are the subject of a study of the "noetic mind" ³. We may say that the "noetic arsenal" has a reverberating impact on law, and vice versa : we often live and continue to live under the influence of old legal - and political - slogans, and drag old legal constructions with us impervious to changing conditions and realities ⁴. Authors so different as Mac Ivor, P.Sorokin and E.Jordan, setting out from quite different standpoints, show a great

1. Gurvitch, p. 37.

2. A.V.Lundstedt, Superstition and rationality in action for peace, London 1925, p. 8 ; A.V.Lundstedt, Die Unwissenschaftlichkeit der Rechtswissenschaft, two vol., Berlin 1932.

3. Gurvitch, pp. 33 and 37.

4. The reproach of a jurisprudential fetshism and superstitious dragging behind the realities of life is repeatedly, though not always convincingly, one of the main themes of Lundstedt. A very short but accurate appreciation of his teachings was given recently by a Norwegian scholar F.Castberg, "Philosophy of Law in the Scandinavian Countries", in : " American Journal of Comparative Law", Baltimore 1955, pp.393-394.

interest in the relations between social reality and spiritual conceptions. Another aspect is to find a correlation between the processes of concentration of capital and the speed of its turnover on the one hand and the structural changes in company law on the other hand ¹.

The period one is able to observe in connection with this study is comparatively short, and, though trends are discernible, it may, perhaps, be still too early to come to any definite conclusions about the meaning of these trends and their connection with general trends observed in sociology.

It is not the task of this study to go into details about the connection between fluctuations in the purely noetic fashions of describing juridical persons as sometimes "realistic" and sometimes "nominalistic" structures ², and fluctuations between "realism" and "nominalism" in general, and the "ideational" and "sensate" mentalities as sociological phenomena ³, but it might be of some interest to note in this place that the uprooting of public companies from their membership base indirectly

1. Müller-Erzbach, p.318.

2. F.Hallis, Corporate Personality, London 1930, pp.137 ff.

3. P.A.Sorokin, Social and Cultural Dynamics, vol.II, New York 1937, p.305. Professor Pitirim Sorokin, now professor at Harvard, G.Gurvitch and W.Sinaiski must in many respects be regarded as pupils of the famous Polish jurist L.Petrazycki. Cf. Baron A.Meyendorff, "Leo Petrazycki", in "Modern Theories of Law" (published by W.I.Jennings), London (Oxford University Press) 1933, p.28. It is quite possible that an early work by L.Petrazycki("Aktienwesen und Spekulation", 1906) has influenced these his pupils to attach more attention to company law problems than could normally be expected from philosophers and sociologists of law.

serves the "realistic" approach, since all public companies become "real" units in the assembly at the top of the state economy. The existing and growing ease with which the practical problem of how to alter the capital of a public company is solved is in a way a revolt against the former "individualistic singularism"¹, where individual interests, sympathies and moods of single persons were taken into consideration. The public company has become in many ways a reality, at first being dressed as a reality by virtue of its collective nature, but, lately, being shaped as a reality in its own right. The cancellation of the rights of the individual² - so very cherished and acclaimed a hundred years ago as the rights of "men and citizens" (and of shareholders as well !) - is a general trend observable in many domains, and is, of course, noticeable in company law too³. This trend towards "realism" is a favourite theme in the works of Pitirim Sorokin. His theories are still important for this

1. Sorokin, vol.II , p.334.

2. F.W.Maitland gave in his "Collected Papers" (vol.III, Cambridge 1919, p.317 and pp.390 ff.) an excellent picture of the English distrust of the early "realistic" theories by Gierke, stressing that even the idea that men could presume to act as a corporation seemed strange for a very long time to the typical Englishman. Cf. : C.T.Carr, The General Principles of the Law of Corporations, Cambridge 1905, pp.180 ff. ; F.Hallis, op.cit., p. XL ; and A.Nekam, The Personality Conception of the Legal Entity, Cambridge (Mass.) 1938, p.97 and passim. Sir Frederick Pollock, Bt., tried to prove (cf. his article in "Festschrift Otto Gierke", Weimar 1911, later reprinted in his : "Essays in the Law", London 1922, pp.151 ff.) that the fiction theory of corporations, then prevalent in English jurisprudence, was n o t based upon Common Law. Cf. also H.A.Smith, "The persona ficta", in "The Juridical Review", vol.26, Edinburgh 1914, pp.60-62 ; and E.M.Dodd, "Dogma and Practice in the Law of Associations", in : HLR, vol. 42 (1929), pp.978-986.

3. This trend was, among others, noticed also by some Swiss jurists. Cf. e.g. E.Bossard, Die Reserven der Aktiengesellschaft im neuen Obligationenrecht, Berne 1940, p.58.

study so far as they admit that even "seemingly special problems enter as organic components into an integrated culture and live and change as such culture changes" ¹. Thus it seems of some value to reveal trends in one particular though seemingly special problem, and to find out whether they fit into the general trends noticed by more universally minded sociologists.

It may at first sound paradoxical to say that the conception of a company as an entity detached from any human membership strengthens and does not weaken the company as a "reality" ², but when we remember that this phenomenon lessens the ambiguity ³ usually attributed to limited companies, we may see that it is not at all so absurd. With a weakened membership base ⁴, it becomes detached from the "human" beings acting as members, and therefore its claim to be a juridical persona has more justification.

The replacement of the so-called collective responsibility by a "responsibility of a total sum of shares contributed by members and managed by a special manager" ⁵ is in its way also an approach to a more

1. Sorokin, vol.II, p.336.

2. The transformation of the owner-manager-entrepreneur class into the class of salaried managers might have created at first an "impersonal" attitude towards the business, partly owing to the size of the enterprise and owing to the remoteness and the bureaucratic character of the officialdom present in the relationship between manager and legal entity, but in the long run the corporation becomes a "reality", i.e. in the fraternity of the higher business. The "impersonality"-touch of the manager is the by-product of the comparatively quick growth of public companies as a distinct type of corporation. Cf. Toynbee, vol. IX, p.572 and note 2.

3. Cf. supra p.14.

4. Müller-Erzbach, pp.318-319.

5. Sorokin, vol.II, p.316 (3).

"realistic" conception of companies, though we are still considered to be very far from the domination of the "realistic" conceptions of law¹. The replacement of the permit or sanction² by a mere registration of the company³ was often considered as one of the first signs of a "turning away" from the nominalistic trends of the nineteenth century⁴. On the other hand, the opinion was expressed by some authors that two institutions of company law, namely, non-par-value shares⁵ and the conversion of shares into stock⁶, somehow represent a trend in the opposite direction, since they mean a "stock-ownership" in proportionate parts⁷, and a lessening of the strength of the juridical personality.

1. Sorokin, vol.II, p.330.

2. Cf. infra p.44.

3. Sorokin, vol.II, pp. 315 and 333 ; vol.IV (New York 1941), p.117.

4. It is interesting to note that the Scots theory on Joint Stock Companies, which was held before the extension of Companies Acts to Scotland in and after 1856, was familiar with the possibility that a mere voluntary union of members may constitute a new persona (cf. J.H.Burton, Manual of the Law of Scotland, The Law of Private Rights and Obligations, Edinburgh 1847, p.188). Remarkably enough, a very "realistic" conception indeed. In England, however, where under the impact of conceptions of Germanic Law the creation of a persona was a prerogative of the state, the aid of a Crown charter was necessary to enable "such companies to continue their existence" (cf. G.J.Bell, Principles of the Law of Scotland, Edinburgh 1833, p.105). Cf. infra pp. 62 ff.

5. Cf. infra p. 80, note 4, p. 140 and pp. 228-229.

6. Cf. infra p. 122.

7. N.S.Buchanan, The Economics of Corporate Enterprise, New York 1940, p.98.

II. The economic background.

The analysis of the economic inducements to alter the capital of a limited company reveals a great variety of reasons for doing so. We are able to classify these reasons from many points of view. Those which are influential in the course of a "normal management" of a company's business may differ from those evolved by unforeseen, chaotic or evolutionary events in the economic life of a nation. They may derive from the policy of the company concerned, or they may be a part of a state's policy. The latter may be in accordance with the wish of the shareholders, but it may also be, and is, in fact, very often, carried out against the interests of the majority, or a large majority, of the company,

Period with a stable currency and a more or less constant policy of foreign trade generally allow prediction of economic trends, and, for a particular company, of its specific possibilities and limitations. This leads to a long-range capital policy, where further alterations may either be avoided or judiciously planned. However, periods of economic uncertainty, currency reforms, convertibility restrictions, and strict exchange regulations are favourable to a "mass psychosis"¹ of alterations of capital. Another element that should be considered is the official policy of particular states which may be either liberal and avoid interference with the growing number of cases of alteration, or tend to guide and

1. Cf. C.M.Schmitthoff, "Distribution of revalued capital assets of a company", in : "Solicitor", vol. 18 (1951), p.135.

supervise the companies in these cases. States with a strong policy of control usually regulate all alterations of the charters, including, of course, alterations of capital too. This is done for two different reasons - firstly to protect the interests of the shareholders, and secondly to seek co-ordination with the general financial policy of the state. A rigid clinging to those structural elements which derive from "partnership", and a perpetuation of the principle of inadmissibility of alterations of the charter are sometimes nothing else than a mild form of supervision of the investment market. The legislative essays of the period after the first World War dealing with these problems show that in almost all cases legislation was lagging behind the requirements of the economic situation; indeed, all too often it lagged far too far behind, and when they did arrive, legislative remedies generally appeared to be half-measures, or, at the best, palliatives that never touched the core of the problem. Greater initial elasticity of the legal apparatus has in many cases proved to be of more assistance in times of uncertainty than "the servile readiness" of the legislature to help when the need arose.

On the other hand, the planned economy and the interest of the state should be independent from the moods of the investors, especially of those of the small or medium type. This leads to the creation of a new type of corporation, whose office-bearers appear to be more reliable from the point of view of the state's interests. This new corporation seems to possess the characteristics of an extreme "anaemic humanity". It is rather a homunculus which in the dawn of the new age has put itself between the state and the general public. This became especially apparent in the totalitarian

attempts to create a new class-hierarchy, and to place an anonymous Wirtschaft at its top ¹, but one cannot altogether deny that a similar threat may occur even in countries built and conducted on the most democratic lines ², especially when the trend is towards diminishing or even eliminating the principles of laissez faire. The planning state ³ needs above all things a chorus of reliable followers, and the type of company, called "p u b l i c c o m p a n y", appears to be the most suitable form for this purpose ⁴.

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1. F.A.Mann ("The new German Company Law and its background", in : "Journal of Comparative Legislation and International Law", 3rd series, vol.19, London 1937, pp.223-228) noted the impact of Wirtschaftsrecht ("economic law") and of Unternehmenslehre ("doctrine of the enterprise"), and, last but not least, of the ideas of Walther Rathenau on the totalitarian and public-law fashions in company law. As a matter of fact, Walter Rathenau's influence on Lord Keynes was in its turn quite considerable. Cf. E.Bossard, *Die Reserven der Aktiengesellschaft im neuen Obligationenrecht*, Berne 1940, p.74 and passim ; P.Gieseke, "Das Wesen der Kapitalgesellschaft", in : "Deutsche Landesreferate zum III Internationalen Kongress für Rechtsvergleichung", Tübingen 1950, p.627 ; and Rauch, vol.II, Graz 1950, p.3.
On the methodological difference between the point of view of a "state's economy" and the point of view of an "economy of the enterprise" see the special study by F.Schönpflug, *Das Methodenproblem in der Einzelwirtschaftslehre*, Stuttgart 1933, p.15
 2. An English author called them recently : "... those organized entities which substantially contribute to the wants and add to the wealth of enlightened nations" (cf. F.Sewell Bray, *Four Essays in Accounting Theory*, London 1953, p.47). Even some Swiss jurists recognized that the main raison d'etre of limited companies was to become an element of the state's economy. Cf. E.Müller, *Kapitalherabsetzung bei der Aktiengesellschaft*, Berne 1938, p.73 ; and B.Zingg, *Der Gläubigerschutz bei der Herabsetzung des Aktienkapitals*, Aarau 1940, p.135.
 3. On the advantages and disadvantages of the planning state attitude see the special studies by : Gaetan Pirou, *La crise du capitalisme*, 2nd ed., Paris 1936, pp.55-87 ; and Jules Moch, *Confrontations*, 7th ed., Paris 1952, pp.420 ff.
 4. The giant non-governmental business corporations are the personification of the idea of subordination of motives directed towards profit making to the altruistic motives of serving the public interests. Cf. Toynbee, vol.IX, pp. 572 and 576.

Thus, in speaking about certain trends in company law we have always to remember that the modern requirements of the planning state foreshadow trends in an unexpected way and degree. This type of company somehow becomes "uprooted", the initial identity of the shareholders with the company being overshadowed by the relations between the state and the company as an entity and as a member of the honourable guild of plan-fulfillers. The legal and economic theory that an enterprise can go "out of business" as it suits the owner, exists only on paper ¹, and indeed, the interdependency of this "cream of companies" and the needs of community is growing continuously. Though it is impossible to say that this trend concerns public companies only, one can assert that these public companies are overwhelmingly t h e typical unit of the planned and conducted state's economy ². This is also one of the reasons why in countries with a planned economy, or in countries with a deeprooted economic totalitarianism, the difference between public companies and other types of private corporations is tending to increase. And, in particular, the alteration of capital is one of the most noticeable points where a radical departure from the contractual basis of the company becomes apparent.

1. Berle, p.45 ; L.C.B.Gower, "Corporate Control : The battle for the Berkeley", in : HLR, vol.68 (1955), pp.1189-1191 and note 51 ; L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in HLR, vol.69 (1956), p.1375.

2. It is submitted that p u b l i c c o m p a n i e s are on the way of becoming a type of their own. Their interdependency with the public interests may soon change the present legal position, namely, that they are merely the remainder after the deduction of private companies.
The American term "close corporation" for "private company" has not up to now been known in Britain, but it is now beginning "to creep into use". Cf.L.C.B.Gower, op. cit., vol.69, p.1376, note 25.

Considering the high proportion of national wealth which is now invested in corporate securities, alterations which change their value are extremely significant to our economy, and should be studied thoroughly¹. These alterations may reflect an expansion or a diminution of business, but they may equally well be due merely to an accountancy reshifting not necessarily involving an alteration in the amount of business. There is nowadays a special branch of economics which deals with the study of cyclic fluctuations in trade², and there is, of course, a connection between the inducement to invest during an "upswing" or "downswing"³, and the general advisability of altering capital in limited companies. A business expansion (from the economic point of view) may mean either a rise in the total sales of one period, or an increase in production facilities, or a larger output, but it does not always mean at the same time an increase of the total value of the capital items⁴, and, even in minor cases, it does not mean an increase of the formal capital figure. For this study only the latter problem matters, but attention will also be paid to a range of questions connected with alteration of the formal capital where no apparent or recent processes of business expansion are or seem to be in the background, as e.g. in the case of an increase of capital from the reserves of the company.

1. A. Becht, "Corporate Charter Amendments, issues of prior stock and alteration of dividend rates", in : CLR, vol. 50 (1950), p. 900 ; and F. Gilson, *Les modifications aux statuts des sociétés anonymes*, Brussels 1919, p. 3 and passim.

2. These fluctuations are more or less the same throughout the capitalistic world. Cf. A. H. Feller, "The Movement for corporate reform : a world-wide phenomenon", in : "American Bar Association Journal", vol. 20 (1934), p. 347.

3. Buchanan, pp. 280 ff.

4. Ibid., p. 295 in fine.

It is, however, beyond the scope of this study to investigate the economic problems of the growing or shrinking of an enterprise and the economic advantages and disadvantages, and gains or losses, essentially bound up with the question ¹; nor is it intended to consider questions concerning "technological" change and alteration in the scale of production ², or the financial problems inherent in acquiring additional productive resources or capital assets ³. It is only to those changes which involve the restatement of capital ⁴ and a modification of shareholders' rights in that connection which will be dealt with.

Apart from the impact of quite extraordinary economic circumstances, like currency reforms, legislative measures ⁵, nationalisation and the like, the normal connection between the economic background and alteration of capital can be expressed in the following way : - The inducement to increase can arise not only from business profits ⁶, but from business losses

1. Buchanan, p.303.

2. Ibid., p. 311.

3. Ibid., pp. 313-318.

4. This term, used by Buchanan, covers practically all the types of alteration of capital discussed in this study.

5. Scherrer, p. 49 (5).

6. E.Folliet, *Le bilan dans les sociétés anonymes au point de vue juridique et comptable*, Lausanne 1920, p.99 ; F.Gilson, *op.cit.*, p. 212 ; Rauch, vol.I, pp.8-9 and pp. 15 ff.; H.Staub, A.Pinner, F.Bondi and H.Koenige, *Kommentar zum Handelsgesetzbuch*, 12/13th ed., vol.II, Berlin 1926, pp.479, 509 and 510.

as well ¹. The inducement to reduce the capital is generally that of losses ², when the capital is usually reduced to the amount of actual assets ³, but there may be fluctuations of business, or a partial unemployment of capital, that may lead to a reduction even without any prior losses ⁴. Financially, it is even, perhaps, an obligation on the side of the company. The most curious cases are perhaps those of a reduction in order to increase the capital afterwards, or to ease the preconditions of a later increase, or, even, a reduction-cum-increase. Thus, from an economic point of view, a reduction may have become necessary to avert an excess or superfluity of capital ; or, where there is an inflation of property values, to eliminate depreciation and fixed charges ; or to pay back that part of the capital which has become a burden on or impairment of business efficiency ; or, finally, to eliminate a deficit and improve the capital position ⁵.

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1. F.Gilson, *Les modifications aux statuts des sociétés anonymes*, Brussels 1919, p.219 ; and Scherrer, pp. 42 and 48 (b).
 2. Charlesworth, p. 95 ; and F.Gilson, *op.cit.*, p.231.
 3. A.K.Kuhn, *A comparative study of the Law of Corporations, with particular reference to the protection of creditors and shareholders*, New York 1912, p. 161, note 1.
 4. L.C.B.Gower, "Companies' Reduction of Capital", in : "Modern Law Review", vol.14, London 1951, pp. 330 ff. ; E.Müller, *Kapitalherabsetzung bei der Aktiengesellschaft*, Berne 1938, pp. 1 and 21 ; Schmid, p.142 ; P.F.Simonson, *The Law relating to the Reduction of the Share Capital*, 3rd ed., London 1932, p.III ; and B.Zingg, *Der Gläubigerschutz bei der Herabsetzung des Aktienkapitals*, Aarau 1940, p.9.
 5. E.C.Lasseigne, "Recapitalization and Reorganization under Louisiana Corporation Law", in : *TLR*, vol. 24 (1950), pp. 325 ff.

III. Legal aspects.

The conceptions "company" and "joint stock company, limited" are commonly regarded as virtually synonymous, but there was no necessary connection between them prior to the middle of the nineteenth century¹. Only then did these conceptions coalesce. Before 1856, almost every company formed was on the principle of unlimited liability², but from that date scarcely any company was constituted but with limited liability³. The principle that limited liability is an incident of a chartered company was known in Scotland, but not in England, for a long time before that⁴. This was partly due to the distinction drawn by Scots Law between the members of a firm and the firm itself⁵, this distinction being nearer to the "realistic" theory concerning legal entities⁶. This distinction was quite unknown in English Law, where incorporation was needed to create the separation⁷, thus approaching to the "nominalistic" conception on these matters. Scots Law, influenced by the familiar institutions of Roman Law, was thus more favourable to the structure of

1. Cooke, p. 18.

2. Cf. infra p. 64.

3. Cooke, p. 175.

4. Levy, p. 79.

5. Cooke, p. 121.

6. Cf. supra pp. 29-32.

7. W.Horowitz, "Historical development of Company Law", in "Law Quarterly Review", vol.62, London 1946, pp. 375 ff.

legal entities as bodies of their own. In addition, the lack of the necessity of formal incorporation brought them nearer to the point of view now known as the "realistic" one ¹.

This acceptance of the principle of limited liability discontinued the former practice of making calls for further payments to the company ². Limited liability was considered incompatible with any obligation on the side of the shareholders to pay such calls, and this has led to the fixity of the capital ³. It is really difficult to imagine how this latter conclusion was regarded as inevitable. One could, as we see now, maintain the principle of limited liability and have, to some extent, a flexibility of the capital as well. But at that time principles of partnership were still so preponderant ⁴ that it seemed quite inconceivable that the mighty superstructure of the legal entity might replace the partnership relations between the shareholders and the limited company with something quite different. It was only much later that the idea occurred that the foundation of a limited company might split the legal background of the "share-

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1. On the history of limited companies as legal entities see : K.Bösselmann, *Die Entwicklung des deutschen Aktienwesens im 19. Jahrhundert*, Berlin 1939 ; H.Schumacher, *Die Entwicklung der inneren Organisation der Aktiengesellschaft im deutschen Recht bis zum ADHGB*, Stuttgart 1937 ; and W.Schmidt-Rimpler, critical notes on these both books by H.Schumacher and K.Bösselmann, in : "Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Germanistische Abteilung", vol.62, Weimar 1942, pp.545 ff.
 2. Levy, p. 786.
 3. Cuenet, p.14 ; R.Fischer, "Die Aktiengesellschaft", in : "Handbuch des gesamten Handelsrechts" (ed.by V.Ehrenberg), vol.III, part 1, Leipzig 1916, pp. 55 ff.; E.Folliet, *Le bilan dans les sociétés anonymes*, Lausanne 1920, p.98 ; Schmid, pp. 4 ff. and p. 142 ; W.Schmidt-Rimpler, *op.cit.*, p. 554 ; J.de Steiger, *Le droit des sociétés anonymes en Suisse*, Lausanne 1950, p.303.
 4. Cf. supra pp. 16-17.

holdership" into two : 1) the relationship that was still dominated by the principles of partnership, and 2) the relationship that was dominated by the new institution. It was sometimes considered that the full strength of the relationship, derived from the partnership institution, lay dormant while a limited company was faultless and in existence, and that by winding-up, or in finding grave defects of its structure, it arose again as a phoenix from the ashes ¹. It was only at a much later stage of development that this awakening was construed, not as a rejuvenation of principles that may have existed prior to the foundation of the limited company, but as a normal consequence of the new institution, the limited company.

In the early heyday of the limited company, the principle of the fixity of capital, or of the inadmissibility of any alteration of the contract, had only one exception - where there was unanimity of all the partaking shareholders. This principle, deeply rooted in the institution of partnership, even now still exerts an enormous influence on the theory and practice of company law ².

This unalterability of contract, charter and capital seemed to be so axiomatic a hundred years ago that many systems of law did not even consider how alterations of the charter or capital could be achieved. In other

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1. E.M.Dodd, Jr., "Partnership liability of stockholders in defective corporations", in : HLR, vol.40 (1927), pp.521 ff.; and Pic-Kreher, vol.I, p.229.
 2. This necessity of unanimity was applied in Britain prior to 1873. Cf. Sir Francis Gore-Browne, T.E.Haydon and H.W.Jordan, Handbook on the Formation, Management and Winding-up of Joint Stock Companies, 41st ed., London 1952, p.521.

countries, one meets the opinion that the normative regulations existing in statute laws are only and exclusively ius dispositivum, i.e. applicable to the case if the shareholders consider them applicable.

The result of such an approach to this problem was that in some countries, especially in those of Common Law, or where statute law left a gap, authority to alter the charter should be granted in the original charter ¹, and that, if that was not done, no statutory regulation authorizing the alteration of charter or capital could apply. Gradually, legislation started to follow to an ever greater extent the practical requirements of a permanently changing economic life, began to regulate in more detailed form the ways and means of achieving an alteration of capital, and did that by parting from the principle of ius dispositivum. The result was that modern company law was usually regarded as being the domain proper of ius cogens regulations ². This generally meant a breach of the "rights" and positions of individual shareholders. Their special rights were no longer unassailable strongholds. A theory started to emerge that the very foundation of a limited company involved an unconditional and eternal surrender of some of the rights otherwise attached to the position of a partner, e.g. the right to oppose an alteration of capital. Thus, a shareholder could no longer oppose such an alteration if it was achieved according to the regulations of statute law and the

1. Levy, p.790.

2. Scherrer, p.60.

charter. In countries with a rigid policy of control over limited companies, no company could be created without the authority of the executive power of the state, or a formal permit or a "concession"¹, no amount of capital could be mentioned in the charter without receiving the approval of a government authority, nor could any alteration of capital be made² without first ascertaining that it was in accordance with the general financial policy of the state³.

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1. Among these countries one still should mention Denmark and Holland, and a number of Ibero-American states, as e.g. Argentina, Chile, Colombia and Uruguay Cf. F. de Sola Canizares, "The Rights of Shareholders", in : "International and Comparative Law Quarterly", vol.2, part 4, London 1953, p.567, note 16. A mild form of a "concession"-control exist besides in Britain, France and U.S.A. Cf. infra p. 71, note 7.
 2. The Borrowing (Control and Guarantees) Act of 1946 (9 and 10 Geo VI, Ch.58) and the Control of Borrowing Order of 1947 provide for that the consent of the Treasury is required for an increase of capital for more than £ 50,000 in any year. Cf. L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in:HLR, vo.69 (1956), pp.1382-1383.
 3. The number of problems left to the arbitrary discretion of the state's authority was, of course, much higher in these countries than in states where there was less interference into the companies' life. This is the reason why the statute books of the countries with a rigid policy of control and supervision are generally without the minute regulations concerning the alteration of capital, as they are known in countries with a free investment market and without restrictions on company life.
There are, of course, exceptions to this rule. One need mention only the Swiss traditions of legislative drafting (cf.infra pp.190 and 201), where laconic style and an extreme liberalism can be found happily together. One wonders whether that is due to a deeply rooted democracy of a specifically Swiss pattern, or due to the interpretative authority of Swiss judges. Otherwise, though it sounds paradoxical, the amount of minute regulations is growing where the whole gamut of problems is left to the private initiative of shareholders and office holders of the company, but diminishes as soon as this private initiative is impaired by a strong policy of concessions. To mention only one familiar example to the reader : no confirmation of a reduction was required in the case of a publicly owned company within the meaning of the Iron and Steel Act of 1949. Cf. S.W.Magnus and M.Estrin, Companies Act 1948, 2nd ed., London 1951, p. 71.

There were, of course, other gaps left open through which escape might be made from the fixity and unalterability of the capital. Sometimes an amount of capital was inserted in the charter far in excess of the initial actual requirements of the company, but with authorization to the company to issue shares later as need arose. Thus the institution of "authorized capital" has been created. Recently a new raison d'être of this variety of increase of capital became apparent, namely the acquiring of greater adaptability in attracting the investment market. Another variety of similar nature - the conditional increase - was introduced (e.g. in Germany) for the same purpose shortly before the second World War ¹, but has not yet developed as an independent institution of company law.

It is rather difficult yet to say whether the attitude is antidemocratic in the totalitarian area in Western Europe, or backward in the united States, where the predominance of the principles of Common Law is still so strong that any deviation from the basic partnership structure is considered as "a decline and fall of the fixed rights of the shareholders"². These fixed rights are now being replaced by a new construction where the shareholders are fading away behind the screen of modern legal entity, while this entity is coming to light and recognition not as a fiction but as a reality ³.

1. C.Ritter and J.Ritter, Aktiengesetz, 2nd ed., Berlin 1939, pp.498-508 ; Teichmann-Koehler, pp. 387 ff.

2. A.A.Berle and G.C.Means, The Modern Corporation and Private Property, New York 1933, pp. 148 and 209.

3. Cf. supra pp. 29-32.

One thing, perhaps, can be said that the shareholders are the last people to be asked whether they would like, or agree to, a suggested alteration of capital. Their role has diminished from the status of partners¹ to that of casual voters in a meeting of the legal entity. Another trend of development has proceeded on parallel lines : the age-old idea of a limited company as a tiny democracy in a nutshell is obsolescent, since the democratic elements have in practice changed their appearance everywhere and turned out to be merely plutocratic ones². Thus, the public company limited by shares is also changing its character from a typical democratic creation of company law to a plutocratic body, and shareholders are becoming simply investors³.

The aim of this study is to compare the mechanism of alteration of capital, to indicate where changes apparent in the general structure of public companies throw light on this particular problem, and to examine what attempts are being made (be they healthy and hopeful, or desperate and faltering) to reform this domain of company law.

However, this structural development inside the institution, changing the emphasis from the peripheral (membership, partnership, shareholder-ship⁴) to the central (personality of the legal entity) has tremend-

1. A.Nekam, The personality conception of the legal entity, Cambridge (Mass.) 1938, p. 106, note 29.

2. P.Gieseke, "Das Wesen der Kapitalgesellschaft", in : "Deutsche Landesreferate zum III Internationalen Kongress für Rechtsvergleichung", Tübingen 1950, p.629 ; and Ripert, p. 98.

3. This change of the psychological attitude (from members to investors) is, perhaps, due to the appearance of a special "improved class of entrepreneurs" which started to dominate the scene. Since the paid-up capital did not always reach the nominal capital the possibility to make business out of the unpaid portions of shares became apparent. Cf. G.Todd, "Some aspects of Joint stock companies 1844-1900", in : "The Economic History Review", vol.IV, London 1932-1934, p.68.

4. Müller-Erzbach, pp. 90 and 318.

ously strengthened the whole institution, and made it more suitable as a unit of a planning state's economy. As long as the contractual relationship was the dominant factor, the merger of values, forces and personalities in the new body was shallow and limited ¹, and one could apply the epithet "limited" not only to the amount of responsibility, which was its primary meaning, but also to the degree of effacement of the personalities "behind the screen". In course of time the public company has become more and more a new unit, with a "reality" entirely derived from the primary "reality" of the personalities initially in the background ². The ways and means of raising capital for a public company, and of increasing and reducing it, have completely changed the atmosphere of the whole institution. The legal personality of the company seemed to be incompatible with the personal touch that lay in the notion "membership" ³, and, on the other hand, the dwindling down of this notion of "membership" to a mere negotiable title ⁴ led to the gradual replacement of "members" ("associés") by "shareholders" in all the texts of companies acts ⁵. In some cases one has no longer an impression of "real collective

1. Sorokin, vol.II, p.316.

2. Cf. supra pp. 29 ff.

3. Cuenet, p. 33.

4. Pic-Kreher, vol.II, p.21.

5. Swiss Law is to some extent an exception to this rule. Theory of Swiss Law postulated that in a l l limited companies there is no membership without participation in the capital. Also in recent publications of Swiss jurists the emphasis on membership is still noticeable. Though Swiss company law provides for a type of companies which corresponds to the British private companies and the German G.m.b.H. (cf. supra p. 8), their p u b l i c companies (G. : "Aktiengesellschaften") are in their character much nearer to the British private companies than any public companies of any other legal system (cf. infra p. 190). The idea of a public company as a self-governing body with a "waning" membership conception is almost unknown in Swiss jurisprudence.

responsibility of members", and the epithet "limited" has come to indicate the detachment of the legal entity from its membership.

It seems sometimes that this epithet merely emphasizes that this new legal entity should in no ways be identified with any member of that company, and that the boundary between the membership and the legal entity is so strong that there are legally no direct relations between any member of a limited company and anyone dealing with that company. The word "limited" expresses the maximum of separation between company and members. Once more, a symbol of the new "realism". Whether we like it or not, the reduction of the responsibility of the shareholders to mere liability for "a sum of money", and, of course, the idea of serving the national economy have strengthened the new "realism" of public companies. We may even, perhaps, predict that the "plutocratic" element, still generally preponderant, will gradually lessen.

The process of lessening of the passivity of the courts goes hand in hand with a lessening of the speculative moment ¹, and a surprisingly quickly growing impact of "public law" elements in the domains of company law ². L. Petrazycki propagated the necessity of a "general policy of law" ³ in order to cope with all the probable effects of a contemplated law reform, and in order to plan the whole business of legislating for a longer period of time in advance.

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1. A. Meyendorff ("Leo Petrazycki", in : "Modern Theories of Law", London 1933, p.31) asserted that in the opinion of Petrazycki "modern principles of civil litigation, namely the passivity of the courts", and those of company law, encouraged tricks and "speculation with other people's funds".
 2. L.C.B. Gower ("Companies' Reduction of Capital", in : MLR, vol.14, London 1951) noticed recently that the Scottish Court, contrary to the English, have a much more "healthy" attitude considering public policy generally, and commercial morality also
 3. G. : "Rechtspolitik".

The degree of development is even more apparent when we ascertain the background from which it started a hundred years ago. Partnership, all types of "personal commercial associations" ¹, and even private companies, and their counterparts abroad, have changed to a much lesser extent. The place they still have in the structure of private enterprise in a given country, and especially, the place held and merited by the private companies, indicate that their life and vigour is still very high, and one may hope that the private initiative of the broad masses of the trading population can thereby be maintained for many generations on the traditional lines, though one has to be aware of the sociological process which is called the "progressive exodus out of private enterprise into public service" ², and its impact on the growing malaise of managerialism ³. However, one has still to agree that those who are in private business are in some way "a measuring rod which can be applied to the publicly-owned industries", and that "the values of the relatively free society can still exercise an influence on the publicly owned sector" ⁴. It is our duty to be aware of the structural and functional changes at the "top" of the pyramid of company forms and types ⁵.

1. Cf. supra p. 15, note 2.

2. Toynbee, vol.IX, pp.572 and 574.

3. Another approach to this question was recently tabled by C.Curran, "The Passing of the Tribunes", in : "Encounter", vol. VI (6), London 1956, p.21.

4. These both quotations are from an anonymous article recently published in the weekly : "Time and Tide" (vol.36, London 1955, p.522).

5. Information about these changes may even, perhaps, enable us to prevent deteriorations and transformations that may become harmful to the whole community. In some cases a well-timed use of these structural and functional changes may help us to avoid disruptive forces which could endanger the evolutionary development of the whole social system. The attention given to public and national corporations, and appreciation of their increasing value in the framework of a national economy, is an indication of a healthy awareness of these problems.

One can observe a great variety of technicalities in connection with the mechanism of alteration of capital, and a great variety of pre-conditions or prerequisites can also be found. Very often the amount of capital has to be stated in the charter ¹. Thus, any alteration of the capital involves setting into motion the apparatus of the alteration or amendment of the charter. This was not always easy, nor was it always possible, even by direct legislation, since the theory of unanimity of all shareholders sometimes considered even legislation, if unauthorized by the charter, as unconstitutional ². It was accordingly something of an

1. In countries of two instruments instead of one (cf. supra p. 13, note 2) the amount of capital has to be mentioned in the Memorandum of Association (C.A.1948), or Articles of Incorporation of American Law. Some of the states of U.S.A. use the term "Certificate of Incorporation" instead of "Articles" (cf.e.g. Stock Corporation Law of New York, 1952, § 35).

2. Berle-Means, p. 208.

This is a typical American standpoint. The lack of a possibility under English Law of vetoing any Act of Parliament as being unconstitutional came recently into the limelight again in connection with the case of Mac Cormick v. Lord Advocate, 1953, S.C., 396. It was observed by the Lord President that the unlimited sovereignty of Parliament was a distinctly English principle which has no counterpart in Scottish Constitutional Law (*ibid.*, p.411). The assertion that a Scottish Court has even, perhaps, a limited power of declaring an Act of Parliament to be in desuetude, or even unconstitutional, as it is the case in the Supreme Courts of the United States, Australia, or the Union of South Africa, has up till now possessed a merely theoretical or hypothetical value. Among the authors who recently commented on this problem in connection with this case one should mention Professor T.B.Smith (cf. : The British Commonwealth, The development of its laws and constitutions, vol.I, part 2 : Scotland, The Channel Islands, London 1955, pp. 622 ff. and pp. 647 ff.), who stressed that the Scottish Courts have not yet rejected the possibility of declaring an Act of Parliament relating to a private right to be ultra vires. Thus, one is inclined to consider whether in theory a Scottish shareholder could seek to have established by an actio popularis the "unconstitutionality" of a specific decision in general meeting, or a provision of the charter, or a provision of the Companies Act. The practical and political value of the power of the courts to check whether an Act is ultra vires was recently noted in an English periodical (cf. "Time and Tide", vol.36, London 1955, pp. 522-523).

achievement that statute law and charter practice started to regulate the process of charter amendment in a more or less detailed way. One can imagine the existence of different clauses regulating the question of when such alteration could be achieved : some legislations allow it only for already registered companies, some make it possible even prior to registration. Again, some legislations require a space of time within which no alterations of the charter or alterations of the capital can be initiated, while others facilitate alterations within a given period of time. A very usual prerequisite of an increase of capital was the requirement that the nominal capital should have been already paid-in, fully, or, at least, to a great extent. Further, in many legislations a "concession"¹ by the state authority is needed not only for the creation of the company, but also for any essential alteration, and very often indeed for a reduction of capital. The problem was discussed once, about twenty five years ago, whether the rigour of the state supervision in this connection was becoming stronger or weaker with time : and the conclusion was reached that the rigour of state control was weakening, except, perhaps, in the case of supervision of a reduction of capital. There are some indications now that a reverse movement has started and "concession"-formalities have been introduced where previously they were unknown.

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1. The courts are usually empowered to act as the state authority in matters concerning reduction, while the Ministry of Finance, or the Board of Trade, or the Treasury (cf. infra p. 71, note 7, and p. 83), or semi-official bodies like the Securities and Exchange Commission in the United States (cf. infra p.220) do it in the case of an increase of capital.



The next set of problems concerns the competence of altering the capital. The generally accepted solution was to endow the general meeting with this function. Sometimes it was reserved for an extraordinary general meeting. Only very seldom were the directors or the board of management empowered to do it. In some rare cases an additional opinion of the advisory council was sought, but, as far as reduction of capital is concerned, a report was very often required from the company's own auditors¹ or the court had to be asked to decide whether the suggested reduction was wellgrounded or advisable. In some other cases this was the appropriate moment to ask for an additional "concession".

The resolution by a general meeting had to be very often a "qualified" one, i.e. a certain quorum or majority, or both of them, were required². Sometimes special regulations are to be found about the agenda of the general meeting where the question of alteration is to be raised. An additional sanction by the court was generally required only for a reduction of capital though this is not altogether unusual for an increase too³. The procedure for increase of capital differed generally from that for

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1. Sometimes it was required not from the company's own auditors, but from a neutral corporate body of auditors, who were designated auditors for one special task as an impartial body. Cf. Steiger, p.304.
 2. A gradual decrease of these "qualified" requisites is observable. Initially they existed in order to certify the older shareholders that the alteration of capital was not to interfere with the amount of their "membership" (cf. Müller-Erzbach, p. 90) ; now, however, the interest to possess such guarantees is quite an infinitesimal one. As an indicator of this lack of interest, the introduction of voteless preferential shares may, perhaps, serve. Cf. Teichmann-Kowhler, pp. 249 ff.
 3. A.C.Connell and A.T.Purse, Companies and Company Law, London 1949, p. 87 ; and Levy, p.405.

reduction. A special procedure was sometimes adopted for the case where an increase of capital could be effected within the framework of the authorized, but not yet issued, capital. A formal resolution of the general meeting was then, as a rule, not necessary.

The fulfilment and execution of the formal resolution to alter the capital was in the hands of the directors. Some more detailed instructions about time and other conditions could be attached to the resolution, or left completely to the discretion of the directors. Reference to the procedure outlined in a prospectus (generally in the case of an increase of capital) was made either in the statute law, or in the text of the formal resolution in general meeting. Similarly, additional regulations could be made in both of these ways concerning the question of whether the subscribing of the full amount of the projected increase was obligatory. In some legislations the regulations on formation of a company are analogically applied to the problems of increase too ¹. The degree of application of this rule varies also from country to country. This applies also to an increase for purchase of property or payment for services ², and sometimes to problems of simultaneous promotion or successive formation ³ as well.

Alteration of capital can be executed either through an alteration (increase or reduction) of the nominal amount of the previously issued

1. Rauch (vol. I, Graz 1947, pp.106 ff.) has given a very detailed analysis of this special question.

2. This type of increase is sometimes called the "qualified increase", sometimes - "the increase for property or services", or " ..for considerations other than cash". Cf. Levy, p. 789.

3. For the adoption of these termini technici of the continental jurisprudence see Levy, pp. 395-398.

shares ¹, or by altering the number of shares (issuing new shares in the case of increase, - or by cancellation or redemption of shares in the case of a reduction of capital). The second type is generally considered as the "normal" concerning an increase of capital, but the first one appears more often in connection with a reduction ². The no-par-value shares may play a particular role in this connection, since there may be involved a change of the quota represented by them, or a change of the represented value without any change of the quota, or, in very exceptional cases, a change of both ³.

The problem of the price of the newly issued shares may appear to be very complex. One has to be aware of the difference between an issue- , or par- , or nominal value of the share, and the p r i c e actually paid for it. There are some legislations that recognize the principle that the new shares should have exactly the same nominal or par-value as the previous ones. The latest development, however, is in a more liberal direction, i.e. there is no obligation to give the new shares the same par-value as that of the existing shares ⁴. One speaks about an issue of shares "below par" if either they are issued at a discount, or, though nominally for the par-value,

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1. In connection with a reduction or readjustment of capital it often happens that one has to keep within the framework of the legal (statute law , or charter) requirement concerning the minimum amount of one share, or the minimum amount of capital.
 2. W.Scherrer (p.55, note 19) gives a comparative survey of the admissibility of an increase of capital by alteration of the nominal amount of the shares.
 3. Cf. infra p. 80, note 4, and pp. 224-229.
 4. Levy, p. 787.

against a commission ¹ or brokerage ² paid by the company. On the other hand, an issue "above par" is the case where the shareholder has to pay a premium above the sum of the par-value ³. As regards mode of payment new shares could be issued against cash, paid at once, or, may be, in instalments, or for property or services. There should also be mentioned the issuings of new shares in lieu of dividends, or by way of division of existing surpluses ⁴, usually called the "bonus"- or "gratis"-shares ⁵.

It is again another problem, whether the newly issued shares rank pari passu with the previously issued shares, or are in some respect preference shares. In most cases, the main preference is that of giving

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1. Gore-Browne, pp. 191 and 521-523 ; Levy, p. 405.
 2. Gore-Browne, pp. 191 and 521.
 3. L.C.B.Gower, The principles of modern company law, London 1954, p.107.
 4. Lit. : H.Buechler, Erhöhung des Grundkapitals mit Ausgabe von Gratisaktien nach schweizerischen Obligationenrecht, Berne 1926 ; P.Joffroy, Des reserves et leur incorporation au capital social, Toulouse 1944 ; H.Lecomte and H.Bosvieux, De l'incorporation de la plus-value de reévaluation au capital social, Paris 1947 ; K.Rauch, Kapitalerhöhung aus Gesellschaftsmitteln, two vol.,Graz 1947/50 ; H.W. Schmid, Die Erhöhung des Grundkapitals bei der Aktiengesellschaft, nach deutschem und schweizerischen Recht, Basle 1938 (typewritten thesis) ; J.Senarclens, Les reserves des sociétés anonymes, Geneva 1943.
 5. Lit. : H.Buechler, Erhöhung des Grundkapitals mit Ausgabe von Gratisaktien ..., Berne 1926, pp. 6 ff., pp. 13 ff., p.25, note, and passim; J.Gringeris, "Gratisakcija" in : "Latvian Encyclopaedia", vol.VI, Riga 1931, pp. 10536-10537 ; Ch.Lyon-Caen and L.Renault, Précis de droit commercial, Paris 1884, vol.I, p.209 ; R.Müller-Erzbach, Deutsches Handelsrecht, Tübingen 1928, p. 299 ; K.Rauch, Kapitalerhöhung aus Gesellschaftsmitteln, vol.I, pp. 23, 30 and 134 , vol.II, pp. 35, 37, 105 and 141-142; C.P.Sanger, The capitalisation of profits by Joint-Stock Companies", in : "The Juridical Review", vol.15, Edinburgh 1903, pp. 1 ff.; W.Scheerer, "Die Kapitalerhöhung bei der Aktiengesellschaft", in : " Festgabe der Basler Juristenfakultät zum schweizerischen Juristentag", Basle 1942, pp. 43-45 and passim ; A.Vavasseur, Traité des sociétés civiles et commerciales, Paris 1897, vol.I, p.362.

a right to a greater or a better secured dividend. Nowadays a new type of preference share has appeared, invested with "better" rights as regards dividends, but without, or reduced, voting rights ¹. American theory deals with sixteen different types of shares, classified according to the presence or absence of preference and limitation, concerning both the dividend payments and the capital distribution ². It is thought that the number of possible varieties is much higher than that.

The issue of new shares is linked with the problem of pre-emptive rights. These are the rights of the present shareholders, and in some relatively few cases of former shareholders or founder members ³, to possess some preference in buying the new shares of a company. Historically these rights originate in the conception of the shareholders' ownership of the capital and represent such ownership enlarged in the same proportion ⁴ beyond the framework of the existing capital. It is still not quite clear whether one should call these rights "fixed rights" based merely on common law, though this standpoint still prevails. If the trend of the pre-emptive rights is

1. Teichmann-Koehler, pp. 249-251.

2. A.H.Frey, " Shareholders' Pre-emptive Rights", in : "Yale Law Journal", vol.38, New Haven 1929, p. 563.

3. Pre-emptive rights may be attached to shares which had not been taken by shareholders who were entitled to subscribe proportionally to their respective holdings and were asked to do so. Thus, according to some systems of law, the company is obliged to offer such shares to the other shareholders (cf. infra p. 282, note 5). Besides, pre-emptive rights may be attributed to persons who are not shareholders at the present moment. These pre-emptive rights are called by some authors the pre-emptive rights of "other shareholders and other persons". Cf. Hamburger, p. 137.

4. Dodd-Baker, p. 904.

in accordance with the "decline of fixed rights", mentioned above, it is interesting to note concerning Great Britain that though since 1929 ¹ there has been no strict obligation to offer new shares to present members in proportion to their existing shares ², and though since 1948 there have been no such clauses in "Table A", and, further, although this omission of these clauses was actually hailed as the elimination of this "trap for the unwary" ³, there is nevertheless no doubt that pre-emptive rights may still be mentioned in the articles of a public company. However, the very fact that the emphasis on these rights in Scots and English Company Law has evidently lessened, illustrates the "decline of fixed rights" in this particular respect. Somehow one has the impression that the structural changes in company law towards a lessening of the stress on the shareholders as owners, and the increasing of the stress on the legal entity as a new "reality" go hand in hand with the decline of these "fixed rights" also. It is beyond the scope of this study, however, to indicate the number of public companies created after 1929 which have not recognized these rights in their articles ⁴, and of those created after 1948 which have intentionally retained them.

1. C.A.1929 (19 and 20 G V, cap.23), "Table A", Art. 35-36.

2. Charlesworth, pp.91-92.

3. Gore-Browne, p. 878.

4. P.L.Reed and C.Wright, Alteration of Share Capital, London 1934, p.100, asserted that most companies contained provisions as to the issue of shares on these terms. This was prior to 1948.

These rights are still very widely recognized in France, the United States and in many other countries ¹. The rules concerning them were attacked from many sides, and problems arose about their revocability by the company (through an exclusion in the charter, or through a resolution in general meeting at a later date), about their waiving or limiting in advance by the shareholders themselves, and about their inoperativeness in some special cases (e.g. if "stock" was issued against property in the United States). Letters of renunciation were the usual instrument by which a shareholder could waive his rights.

Any alteration of capital may mean an alteration of the interests and property rights of shareholders. From contractual standpoint, based on the idea that the rights of shareholders were rights in personam, there is always some breach of contract, or interference with property, when shareholders' rights or interests are altered without their consent ². Though it can be said that there has been a "decline and fall" of the fixed rights in this respect also, these problems have still to be considered, as they play an important role in modern company law.

Sociologically, it is quite in the general line of development that the rights of shareholders should become as brittle, as any right of citizens,

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1. F.de Sola Canizares, "The Rights of Shareholders", in : ICLQ, vol.2 (1953), part 4, p.572 (9) and note 61 ; and Buchanan, pp. 78 ff.
 2. A.C.Becht, "Corporate Charter Amendments : Issues of prior stock and the alteration of dividend rates", in : CLR, vol.50 (1950), p.901.

generally under the influence of "reproaches of singularism"¹. Even the tendency to explain these rights not as contractual, but as deriving from the charter and to be considered merely as an item in the framework of limited companies, could be interpreted by Sorokin as an indirect indication of a centripetal force operating inside the institution.

One has to consider not only the impact of an alteration of capital on the rights of the existing shareholders, but also on the conferring of rights on new shareholders. Here should be mentioned the problem of the moment when these rights - mainly the voting and dividend rights - begin to operate. All these modifications may influence the relative positions of different groups of shareholders. Special provision to protect the interests of these groups has been made in some countries. This too is in a way an indication of a weakening of the position of a single shareholder and the strengthening of the position of the group. Again a replacement of Common Law by statutory company law.

Lastly, the procedural problems arising in this connection should now be outlined. There are always certain formalities to be observed in respect of the publication of the resolutions, the prospectus, the subscription, and the formal statement of the accomplishment of an alteration of capital. There are some regulations about the technical distribution and allocation of the new shares, and sometimes about the time limit within which alteration should be completed. In some cases these time limits are peremptory.

1. Sorokin, vol. II, p.335.

Recently some varieties of alteration have been developed in some systems of laws, especially concerning meetings of different classes of shareholders where there is multiformity of shares. Shortened and temporary forms of increase procedure have also been sometimes introduced.

Alterations of capital comprise not only the increase and reduction of capital, but also the readjustment of capital, and the reorganization of capital. Both of them are sometimes called *alterations in capital*¹, since alteration of the authorized capital, or of the number of shares, or of the nominal amount of the shares is *not* involved in every case². Though both of them may sometimes mean partly an increase, and partly a reduction, their characteristics lie in quite different directions. Readjustment of capital refers to the cases where a change of the denomination of the capital has taken place. This process is sometimes called "renaming of capital"³, sometimes "re-nomination of capital". Typical cases are the alterations of capital following upon the various currency reforms in Germany after the first and after the second World Wars, and the cases of companies that have changed their "nationality" in the course of territorial adjustments, annexations and incorporations⁴.

1. Cf. *supra* p. 9.

2. O.Griffiths and E.Miles Taylor, *The principles of company law*, 5th ed., London 1949, p. 139.

3. E.g. in the pre-soviet law of Latvia.

4. It is beyond the scope of this study to discuss the intricate problems of the legal status of companies that belong to a territory the annexation or incorporation of which has not been legally recognized by some other countries. Nor is any other problem of International Company Law discussed in this work.

Reorganization of capital, on the other hand, means an alteration in rights attaching to various classes of shares without alteration of the total amount of capital. Here are to be mentioned alterations in preferences, alterations of the division of the capital into shares, and alterations in the relative positions of groups of holders of "stock" : again, the conversion of shares into "stock" is one of the main problems here ¹. But it is beyond the scope of this study to investigate those cases of reorganization which consist only in a variation of shareholders' rights.

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1. Some authors use the expressions "readjustment" and "reorganization" in a quite different sense, as e.g. Buchanan (p.370), who includes in "corporate readjustment" all the cases of " . restatement of proprietors' capital, the modification of shareholders' contractual rights, and exchanges of shares ... which are initiated voluntarily by the proprietors", and uses the phrase "corporate reorganization" to denote all "changes .. in the financial plan, the valuation of assets" when they "are not a matter of choice with the proprietors but are f o r c e d upon them because of legal procedure established for dealing with cases of actual or immanent nonpayment of debts".

IV. Individual Surveys of Different Countries.¹

1. Great Britain.

(Scots and English Law) .

The historical background of Scots and English Company Law differs in many respects. The achievement of separate personality in English Law, which was so widely acclaimed in connection with the Salomon case in 1897², does not rank so highly in Scots Law, where the principle of a separate persona was recognized long before 1856, and where a different conception of partnership existed³. It was argued as far back as 1728 that a

1. The order in which different countries are dealt with in this chapter is explained in the Preface of this study. Cf. supra pp. 11-13.

2. (1897), A.C.22 ; 66 L.J.Ch..

Cf. : C.T.Carr, The General Principles of the Law of Corporations, Cambridge 1905, pp. 7 ff. ; Cooke, pp. 176 ff.; Gore-Browne, p. 4 (in fine); F.Hallis, Corporate Personality, London 1930, pp. XLIII ff.; Lord Macmillan, An Outline of the Law of the Joint Stock Companies, Edinburgh 1907, pp. 27 ff.; M.Barlow, "The new Companies Act 1900", in : "Trusts, pools, and corporations", (ed.by W.Z.Ripley), Boston 1905; H.A.Smith, The Law of Associations, Oxford 1914, pp. 53-55 ; and Lord Chorley and O.C.Giles, Chorley and Tucker's Leading cases on Mercantile Law, 3rd ed., London 1948, pp. 144-147.

A temporary set-back for this point of view occurred during the First World War in connection with the consideration of some legal entities as statutory enemies. Cf. i.a. : J.E.Hogg, "The personal character of a corporation", in : LQR, vol.53, London 1917, pp. 76 ff.

3. R.Brown, "The Genesis of Company Law in England and Scotland", in : "The Juridical Review", 1901, B, pp. 187-188.

"corporation was the equivalent of a person in a court of law" ¹. It was urged in one case in 1757 that although " the contract of the British Linen Company has no clause expressly providing for a limited liability ... yet it was never dreamed that the private estates of the subscribers were bound for the company's debts" ², and although clauses restricting liability were quite frequently included in articles of association of that time ³, the principle of limited liability ⁴ was then generally unknown in Scotland ⁵. The general attitude at that time was that limited

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1. Cf. inter alia : A.B.Du Bois, *The English Business Company after the Bubble Act 1720-1800*, New York 1938, p.137 (10); Levy, p.79 ; J.A.Lillie, M'Neil and Lillie's *Mercantile Law of Scotland*, 4th ed., p. 312 * and T.B.Simpson, "Company Law, with particular reference to the Companies Bill", in : "The Accountants' Magazine", vol.32, Edinburgh 1928, p. 147.
 2. A.B.Du Bois, op.cit., p.149 (56). 3. Ibid., p. 259 (74).
 4. Only "with the acceptance of the principle of limited liability not only ^{as} against creditors but also as between the ... company and the shareholders" (Levy, p.786) did it cease to be possible for the company to make calls against the wish of the shareholders. Limited liability has always been considered in Britain as based on shares with a fixed nominal value or on guarantees for a fixed sum.
Cf. Minutes of evidence taken before the Committee on Shares of no par value, London (HMSO) 1954, p. 172. Cf infra p. 80, note 4, p. 229, note 1, and p.284, note 9.
 5. It is, however, laid down in *Stevenson and Company v. Macnair* (14th December, 1757 ; 5.Br.Sup. 340 , and Lord Kames' *Select Dec.*, 135) that partners in ordinary joint stock companies (i.e. even without an Act of Parliament) are not liable beyond their shares of subscribed stock. It may happen that this Scottish case of 1757 had an impact on the writings of Adam Smith in 1776, who said then that each partner should be "bound only for his share". Cf. J.R.Christie, "Joint Stock Enterprise in Scotland before the Companies Acts", in : "The Juridical Review", vol.21, Edinburgh 1909-1910, pp. 131 and 145.
See also : J.H.Burton, *Manual of the Law of Scotland, The Law of Private Rights and Obligations*, Edinburgh 1847, p. 189 ; A.B.Du Bois, op.cit., pp. 224-225, and p. 259 (75-79) ; J.R.Christie, op.cit., pp. 138-140 and p. 143 ; R.Henderson, *Notes on the Law of Scotland in regard to Joint Stock Companies*, Edinburgh 1846, p.1 ; Levy, p. 79 ; and J.C.Lorimer, *Outline of the Law of Joint Stock Companies*, Edinburgh 1884, p. 3.

liability was a purely English invention, and indeed there was a very wide opposition to it in Scotland ¹.

Though English Law had no objection to "limited liability" in itself, the Limited Liability Act of 1855 is said to have introduced this principle into English Law ², but this Act did not apply to Scotland ³. Furthermore, the Mercantile Law Commission, set up to investigate the difference between Scots and English Law, reported against the expediency of extending it to Scotland. Only a year later, however, the new Companies Act was extended to Scotland ⁴: but the final introduction of limited liability was supported in Scotland only by a bare majority. Of the thirteen sets of answers that came then from Scotland, seven were in favour of a limitation of liability, and six against ⁵. Indeed the principle of limited liability came into being in Scotland very gradually, and became effective only about 1866 ⁶: two of the Scots banks, in fact, continued as unlimited companies until 1882 ⁷. But although the economic activities of other Scots

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1. B.C.Hunt, *The Development of the Business Corporation in England 1800-1867*, Cambridge (Mass.) 1936, pp.69-70 and note 48, and pp.117 ff. See also the arguments in an anonymous article in "The Edinburgh Review", vol.95, pp.446 ff.: not a single word is mentioned there about the point of view of Scots Law in the question of limited liability.
 2. C.T.Carr, *The General Principles of the Law of Corporations*, Cambridge 1905, pp.109ff; J.R.Christie, op.cit., p.135; Cooke, p.152; B.C.Hunt, op.cit., p.89; and H.A.Shannon, "The coming of general limited liability", in : "Economic History" (published by "The Royal Economic Society"), vol.II, London 1933, p.282.
 3. J.R.Christie, op.cit., p. 146.
 4. Joint Stock Companies Act 1856, 19 and 20 Vict., cap. 47.
 5. R.Brown, "The Genesis of Company Law in England and Scotland", p. 186.
 6. G.Todd, "Some aspects of Joint Stock Companies 1844-1900", in : "Economic History Review", vol. IV, 1932, p. 69 and note 3.
 7. A.W.Kerr, *History of Banking in Scotland*, Glasgow 1884, pp.230-232 ; J.L.Anderson, *The Story of the Commercial Bank of Scotland Limited*, Edinburgh 1910, pp. 77 ff.

joint stock companies were comparatively small ¹, the background of Roman Law was very favourable to a sound and healthy development of the basic principles of company law ².

The last purely Scottish Companies Act of the nineteenth century was the "Companies Clauses Consolidation (Scotland) Act 1845" ³ which is still of interest in many respects, though it only covered a very small part of the whole field of company law ⁴. It is worth while to note that this Act has never been wholly repealed ⁵, and some of its provisions were incorporated in the Companies Act of 1948 ⁶. Section 59 of this Act of 1845 ⁷ made it lawful to raise capital by creating new shares, "unless

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1. "This species of partnership .. only to have become judicially known since the year 1825" (R.Henderson, Notes on the Law of Scotland in regard to Joint Stock Companies, Edinburgh 1846, p.2). On the Scots companies of the late forties of the eighteenth century, see : A.B.Du Bois, The English Business Company after the Bubble Act 1720-1800, New York 1938, p. 72.
 2. Cf. infra pp. 295-296.
 3. 8 and 9 Vict., cap.17. The text of this Act is appended to G.W.Wilton, Company Law and Practice in Scotland, Edinburgh 1912, pp. 613 ff.; and Wordsworth's Law of Railway, Banking, Mining and other Joint Companies, 5th ed., London 1845. Cf. also : W.D.Rawlins and The Hon.M.M.Macnaghten, Law and practice in relation to Companies under the Companies Clauses Acts 1845 to 1889, and under the Companies Acts 1862 to 1900, London 1901.
 4. It was in some respects a very early "TableA" for statutory companies in Scotland, or a standard type of the text of what one (if speaking about companies registered under the Companies Acts) would call articles of association of "companies ... of a public nature". Cf. L.Levi, Manual of the Mercantile Law, London 1854, p.186 ; Charlesworth, pp. 262 ff.; and R.Henderson, op.cit., p.7.
 5. Cf. Chronological Table of the Statutes covering the Legislation to December 31, 1954, London (HMSO) 1955.
 6. 11 and 12 Geo VI, cap. 38, S. 287 (6).
 7. 8 and 9 Vict., cap. 17, S. 59. Cf. also G.W.Wilton, op.cit., p.649.

it be otherwise provided by Special Act"¹. This procedure was called "Augmentation of Capital", and in connection with this augmentation of capital, pre-emptive rights were given statutory force in Scots Law². Reduction of capital, however, remained at that time completely outside the statute book³.

Contrary to the more advanced Scots Law, English Law up to 1844 prohibited joint stock enterprise for ordinary trading and manufacturing purposes⁴, but even in 1844 the English Companies Act⁵ still continued

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1. In Companies Clauses Consolidation Acts of the second half of the nineteenth century this presumption was reversed, i.e. these Acts did not give power to increase capital, unless this power was mentioned in the special act. Cf. Charlesworth, p. 264 ; and W.F.Hamilton, A Manual of Company Law, 2nd ed., London 1901, p. 51.
This is a specific example of the ius dispositivum-fashion of that time.
 2. 8 and 9 Vict., cap.17, S. 61 : " ... and such new shares shall be offered to the then shareholders in the proportion aforesaid ; and such offer shall be made by letter under the hand of the secretary ... ". The parallel English Act (8 and 9 Vict., cap. 16) contains the same provision (S.58). The text of the English Companies Clauses Consolidation Act of 1845 is given in : W.D.Rawlins and The Hon. M.M.Macnaghten, op.cit., pp.1-106 ; and R.J.Sutcliffe, Statutory Companies and the Companies Clauses Consolidation Acts, London 1924, pp. 11-122. See also: A.Crew, Company Law, London 1938, pp. 305-346.
 3. Though a reduction of capital was a relatively infrequent occurrence in the eighteenth century there were still some cases known. Cf. A.B.Du Bois, op. cit., pp. 357 ff. and pp. 146 (48) and 341 (164). Reduction was mentioned for the first time in the statute book in 1867 (30 and 31 Vict., cap.131). Cf. R.R.Formoy, The historical foundations of modern company law, London 1923, p.135; Levy, pp. 86 and 804 ; H.B.Buckley, The Law and Practice under the Companies Acts 1862 to 1893, 7th ed., London 1897, p.580 ; G.F.Emery, A treatise on Company Law under the Acts 1862-1900, London 1901, pp. 24-35.
Similarly, reduction remained outside the statute book in some of the American states, e.g. in Louisiana. Cf. S.D.Thompson, Commentaries on the law of Private Corporations, vol.II, San Francisco 1895, p. 1571.
 4. J.George, A view of the existing law affecting unincorporated Joint Stock Companies, London 1825 ; H.A.Shannon, " The coming of general limited liability", in : " Economic History", vol.II, London 1933, p. 267.
 5. C.A.1844 (7 and 8 Vict., cap. 110).

to consider joint stock companies merely as a variety of partnership¹, though without any direct appliaction of the principles of Common Law per analogiam. Scots Law of that period applied the general principles of Roman Law to Company Law problems as well, and had recourse to statute law only in those few cases where ~~there~~ was statute law to apply.

The idea that a firm could and must be separated from the persons conducting the business was common property on the European Continent and in Scotland from the second half of the sixteenth century², while it was then quite unknown in England. The Scot, of course, has always been more cosmopolitan as a type³. The infiltration of Englsih commercial law into Scotland started after 1707, however, and became especially marked in the field of company law⁴. At the same time analogies from Continental systems of law began to lose their attraction, and quotations were used ever less frequently⁵, but, none the less, certain peculiarities of Scots Law prevented domination by English policy⁶, and it is doubtful whether the

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1. One has, besides, to bear in mind the divergence of Scots and English Law on partnership. Cf. R.Brown, "The Genesis of Company Law in England and Scotland", in "The Juridical Review", vol.13, Edinburgh 1901, pp.189 and 196 ; Charlesworth, p.3; Cooke, pp.132, 137 and passim ; W.Horowitz, "Historical development of Company Law", in : LQR, vol.62 (1946), pp.378 and 385 ; H.A.Shannon, op.cit, pp.270 ff. ; H.Smith, "The persona ficta", in : "The Juridical Review", vol. 26 (1914), p.59.
 2. Cooke, p. 185.
 3. Lord Macmillan, "Scots Law as a Subject of Comparative Study", in : "Memoires de l'Academie Internationale de droit compare", vol.II, part IV, Paris 1935, p.15.
 4. J.R.Christie, "Joint Stock Enterprise in Scotland before the Companies Acts", in : "The Juridical Review", vol. 21, Edinburgh 1909-1910, pp.128 ff.
 5. A.B.Du Bois, The English Business Company after the Bubble Act 1720-1800, New York 1938, p.226.
 6. Ibid., p. 87.

Bubble Act could have been fully applied in Scotland ¹. The principle of incorporation was in England still considered as a privilege and not as a right ², while the Scots point of view was much nearer to the later development ³. Even unincorporated companies in Scotland made some attempts to be considered as personae in courts of law ⁴.

It has been asserted that it was not an adaptation of a new legal institution (new at least to English Law) that was decisive, but mainly the revolution in the conception of the nature of property in capital ⁵. That does not mean that Scottish economic circumstances were different and more favourable in this respect, but that, rather, Scots Law proved again to be more adaptable from the point of view of legal architecture ⁶. Thus, the ideas incorporated in the statute law of 1844 ⁷ were less novelties for

1. R.Brown, op.cit., p. 190 ; and J.R.Christie, op.cit., p.137.

2. Cooke, p. 143.

3. R.Brown, op.cit., p. 187 ; and W.R.Scott, The constitution and finance of English, Scottish and Irish Joint Stock Companies to 1720, vol. I, Cambridge 1912, p.300. On the American point of view see : E.H.Warren, Corporate Advantages without Incorporation, New York 1929; and the review of this book by C.G.Little, in : HLR, vol. 42 (1929), pp. 967 ff.; and E.M.Dodd, Jr., "Dogma and Practice in the Law of Associations", in : HLR, vol.42 (1929), pp. 977-1014.

4. A.B.Du Bois, op. cit., p.420 (176) ; and J.R.Christie, op.cit., p. 130.

5. R.H.Tawney, The Acquisitive Society, London 1952, p. 72 in fine.

6. The success of the Scottish business circles against the crisis of 1825 was partly explained even then by the very fortunate "joint-stock-company"-system in Scotland. Cf. B.C.Hunt, The Development of the Business Corporation in England 1800-1867, Cambridge (Mass.) 1936, pp. 48-50 and notes 106 and 108 ; and R.Brown, op.cit., p.191.

7. It was asserted by R.Brown (op.cit., p.195) that this Act of 1844 possesses the historical fame of being the first ~~law~~ legislation where a definition of a "joint stock company" has been introduced. It was, however, only in 1862, that the term "company" was approached not from the side of a partnership, but from that of a ... joint ownership (sic!). Cf. R.Brown, op.cit., pp. 197-198.

Scotland than for England, though the economic background might have seemed to have advanced more towards a modern conception of capitalism in England than in Scotland. What generally was referred to as an extension of the Companies Acts to Scotland was in many ways the reverse, i.e. principles quite ancient and within the framework of Scots Law have been introduced into statutes applying to England as well as Scotland. If the policy concerning company law that started in 1856 and meant the adoption of the principle Laissez faire¹ was a rather sudden and complete change from that which existed previously, the Companies Acts of the sixties marked, in fact, not only a remarkable lessening of the laissez faire, but also a return to legal traditions that were familiar in Scotland prior to 1856². Up to the end of the last century the point of view was prevalent that for the statutory enactments concerning company law "we are mainly indebted to the skill and experience of mercantile lawyers in the sister country"³.

To assert that since 1856, or, at least, since 1862⁴, Scots and English Company Law have become so similar that they have "moved on

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1. W.Horowitz, "Historical development of Company Law", in :LQR, vol.62 (1946), pp. 381 and 383.
 2. R.Brown, "The Genesis of Company Law in England and Scotland" , in : "The Juridical Review", vol.13 (B), Edinburgh 1901, p.192, calls them unconscious revivals.
 3. Cf. the address of Lord Watson at the Annual Public Meeting of the Glasgow Juridical Society in 1883, published in : "The Juridical Review", vol.13, 1901, p.3. This point of view was heavily attacked by R.Brown (op.cit., p. 185).
 4. 25 and 26 Vict., cap. 89.

identical lines" ¹ would be an oversimplification of the situation ². The existence of identical Companies Acts does not necessarily mean an identical attitude towards their interpretation, especially in view of the fact that the common law principles of Scotland differ from those in England ³. An identical approach to the filling up of gaps and loop-holes is therefore not always possible. It would be safer to say that the general plan and the structure of modern company law set up in the Acts of 1844, though altered and amended in many points, has remained the same in the two countries up to the present time ⁴, although it would be, perhaps, more correct to say this if we start with the Companies Act of 1862 ⁵.

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1. Levy, p. 78.
 2. A special study on the still existing differences is given by G.W.Wilton : Company Law, Principal distinctions between the laws of England and Scotland, London 1923. His remarks on "uncalled" capital (op.cit., p.26) may still be of some interest. Cf. infra p. 106, note 1.
 3. L.C.B.Gower, "Some contrasts between British and American Corporation Law", in : HLR, vol.69 (1956), p.1369, note.
 4. Cooke, p. 138.
 5. In order to explain the textual history of the statute law concerned, a table of the texts of those sections of the Companies Acts which deal with the problem of alteration of capital is given as Annex I to this study.
Cf. infra pp. A 1 - A 18.
The starting point of this table is the Companies Act of 1862. The numeration on the top of each section or article refers to the Companies Act of 1948. The numbers on the outer margin refer to previous Companies Acts.
There are different comparative editions covering the whole text of Companies Acts. Cf. e.g. : Prof.W.Annan, An arrangement of the Companies (Consolidation) Act, 1908, as amended by the Companies Act, 1928, with General Index, Edinburgh 1928 ; J.G.Hassel, Comparative tables of the sections of the Companies Acts 1929, 1947 and 1948, London 1948.
Further, shortened forms of a table of comparison are sometimes appended to editions of the texts of the Companies Acts, e.g. : M.Finer and H.A.C.Sturgess, The Companies Act, 1948, London 1948, part 3, pp.3-50 ; D.G.Hemmant, The Companies Act, 1929, 9th ed London 1930, pp. XXIX-XXXVIII ; C.W.Turner, Index to the Companies Act, 1948, with comparative tables, 10th ed., London 1948, pp.466-480.

The only place where the term "Alteration of capital" is used as a heading to cover all the types of alteration discussed in this study is in the Table A ¹. "Reduction of capital", as one of the main varieties of capital alteration, entered the scene at a later stage ² than "increase of capital", and, perhaps, it was partly on account of this later appearance, and not entirely due to the influence of the creditors' interests, that it acquired and has since retained a special place of its own in the system of the Companies Acts, in which there is usually a subdivision entitled "Reduction of Share Capital" ³, but none devoted to increase of capital ⁴. However, both of them, increase and reduction, involve an alteration of the memorandum ⁵ and of the articles of association ⁶.

The regulations concerning increase of capital - and they are very few in number ⁷ - are to be found in the subdivision "Miscellaneous Provisions as to Share Capital" ⁸. In this miscellany provisions on increase of capital

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1. First Schedule of the Companies Act of 1948. Cf. Annex I, infra pp. A 17-18.
 2. Cf. C.A.1867 (30 and 31 Vict., cap.131), Ss.9-20, and the General Order of the High Court of Chancery issued by the Lord High Chancellor in March 1868 (rules 2-20). The text of this Order is appended to Shelford's Law of Joint Stock Companies, London 1870, pp.467 ff. See also : Green's Encyclopaedia of the Laws of Scotland, Supplementary Volume, Part 1 (Supplement to vol.1-9, General Editor : J.F.Gordon Thomson) Edinburgh 1949, p. 186 (93). Cf. supra p. 66, note 3.
 3. C.A.1948, Ss.66-71.
 4. Cf. infra pp. 202 and 275.
 5. C.A.1948, S.69 (5)(6).
 8. C.A.1948, Ss.59-65.
 6. Fletcher Moulton's Companion to the Companies Act, 1929, London 1929, p.26.
 7. The provisions about the consent of the Treasury, which is required for all increases for more than £ 50,000 a year, are to be found outside the Companies Act in the Borrowing (Control and Guarantees) Act, 1946 (9 and 10 Geo VI, cap.58) and in the Control of Borrowing Order of 21st May, 1947. Cf. F.C.Howard, Exchange and Borrowing Control, London 1948. These regulations replaced those "Defence (Finance) Regulations" of the 3rd September, 1939, which were introduced shortly after the beginning of the war. The limit of £ 50,000 a year was fixed by the Order of 21st May, 1947. Up to the 21st April, 1949, any issue of shares (even below this figure of 50.000) was not allowed without the consent of the Treasury where the issue included the capitalization of profits or reserves. Another exemption concerned some of the issues by private companies. A special Capital Issues Committee was set forth to deal with these permits.

occupy an extremely small place, and do not contain many limitations on the increase of capital, and their laconic style produces, of course, an abundance of gaps which have to be filled from other sources. These provisions are not applicable to an increase of capital effected within the limits of the authorized capital. Such an increase is normally effected simply by a resolution of the board of directors, and there are no special formalities that have to be observed ¹.

The first pre-requisite mentioned in this subdivision of the Act of 1948 is - authorization by the articles ². Table A contains this authorization ³. In cases of public companies, amendments to the usual Table A may be so numerous as to lead to the framing of complete sets of articles excluding Table A ⁴. Thus, besides the official Table A ⁵, there were and still are in operation semi-official types of articles of association of a public company, usually referred to as "forms" ⁶. If a company has its

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1. Increase of capital treated in this study is in most cases an increase beyond the limits of the authorized capital. Cf. supra pp. 25 and 45, and infra pp.277-278.
 2. The Companies Act of 1844 required the deed of settlement (cf. supra p.13, note 2) to provide for increase of capital. No further Act included a similar provision. Later Companies Acts referred both to the original articles and to later amendments achieved by special resolution passed by a majority of not less than three fourths. Cf. R.R.Formoy, The historical foundations of modern company law, London 1923, p.78; and J.C.Lorimer, Outline of the Law of Joint Stock Companies, Edinburgh 1884, pp. 16 and 49. Since 1907 special resolutions were considered superfluous. Cf. infra pp. A 2 and 5.
 3. Cf. infra Annex I, p. A 3, footnote 2, and p. A 17.
 4. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p.29; and Green's Encyclopaedia, op.cit., p. 168.
 5. Cf. infra Annex I, pp. A 17-18.
 6. One should mention in this connection the form reproduced under the title "Form 59" in : V.Nicolas, The Law and Practice relating to the formation of companies, London 1908, pp. 215-252; or to "Form No. 2" in : G.W.Wilton, Company Forms in Scotland, Edinburgh 1920, pp. 48-169; or to "Form 277" in : Palmer's Company Precedents, 16th ed., vol.I, pp. 472-672.

own articles, either drawn on the lines of one of the standard forms or completely individualistic, and they do not contain power to increase the capital either by a reference to Table A, or express regulation, such power can be obtained by amending the articles ¹ in the normal way. If, however, the original shares do not all have the same rights, and the provisions defining such rights are contained in the memorandum, then the shareholders' rights so defined cannot be altered even with the consent of all the shareholders, unless the memorandum contains a power to alter such rights. If the memorandum does not contain such a power ², the sanction of the court is necessary ³; and this can be obtained in the course of an application under S.206 of the Companies Act of 1948 ⁴.

The second pre-requisite for an increase of capital is an ordinary resolution ⁵ passed in general meeting, provided, of course, that the articles authorize an increase ⁶. The articles may, of course, limit this authority by e.g. requiring a quorum, or a qualified majority, or both combined.

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1. Both actions, i.e. the amendment of the articles and the increase of capital, can be accomplished uno flatu provided that the resolution is passed by the majority necessary to qualify as a "special" one. Cf. Gore-Browne, pp. 520-521; Levy, p.787; Palmer's Company Law, 19th ed., London 1949, p. 70.
This does not apply to reduction of capital. Cf. infra pp. 90-91.
 2. E.g. specified preferential rights might be "irrevocably" attached to a particular class of shares. In such cases a subsequent increase must not contravene these provisions. In practice it happens very seldom indeed. Cf. O.Griffiths and E.M.Taylor The principles of Company Law, 5th ed., London 1950, p. 131.
 3. A.C.Connell and A.T.Purse, Companies and Company Law, 6th ed., London 1949, p.86; and O.Griffiths and E.M.Taylor, op.cit., pp. 7 and 140.
 4. Cf. infra p. 86.
 5. In the C.A. of 1908 and prior to that, a special resolution passed with a qualified majority was required. Cf. infra, Annex I, p.A 4, footnote 1, and p.A 17, footnote 1. Since, however, C.A.1948, S.61 (2), does not mention an ordinary resolution as a pre-requisite, any resolution would suffice. Cf. Palmer, p.69.
 6. The articles cannot, however, delegate this power. Cf. Bennett and Bennett, op.cit., p. 117.

Nothing is mentioned in the Act about the manner in which the capital is to be increased, but the problem arises whether in connection with the phrase : "...by new shares of such amount as it thinks expedient" ¹ the other variety of increase which is practised in other legal systems, i.e. an increase of the nominal amount of the previously issued shares, is admissible under Scots and English Law ². The next section, relating to an increase ³ does not use this restrictive phrase. Thus, and in view of the exclusive character of the preamble of S.61 (1) ⁴, it could be asserted that this variety of capital increase seems to be unknown in Britain ⁵. However, it is worth while investigating how far the filling of this gap is theoretically admissible, whether by explicit enactment ⁶, or

1. C.A.1948, S.61 (1)(a).

2. L.C.B.Gower (The principles of modern company law, London 1954, p.107) apparently denies this possibility and recognizes the issuing of new shares as the only way.

3. C.A.1948, S.63 (1).

4. Cf. infra p. 92, note 2.

5. The English Companies Act of 1844 (7 and 8 Vict., cap.110), Schedule (A), Art.33, suggested two modes of "augmentation" of capital, i.e. by the conversion of loans into capital, or by the issue of new shares, adding cautiously "or otherwise". Authors were puzzled at that time what other mode that could mean. Cf. G. Taylor, A practical treatise on the Act for the Registration, Regulation and Incorporation of Joint Stock Companies, London 1847, pp.160-162. It is submitted that in keeping these two words in the statute book the possibility of an increase of capital by increasing the nominal value of the shares would have been recognized as admissible. However, the only case known in Great Britain of increase of capital without an issue of new shares is the increase carried out by The Commercial Bank of Scotland in 1882. It was based upon S.5 of the C.A.1879 which stipulated that an "...unlimited company may ... increase the nominal amount of its capital by increasing the nominal amount of each of its shares". The present formulation of this rule is to be found in C.A.1948, S.64. Cf. R.R. Formoy, The historical foundations of Modern Company Law, London 1923, p.137 ; C.E.H. Chadwyck Healey, P.F. Wheeler and C.E.E. Jenkins, A treatise on the law and practice relating to Joint Stock Companies, 2nd ed., London 1886, p. 734.

6. Neither of the above mentioned Companies Clauses Consolidation Acts (8 and 9 Vict., cap. 16 and 17) give an explicit answer, since the articles in question restrict the augmentation to that effected by creating new shares. Cf. G.W. Wilton, Company Law and Practice in Scotland, Edinburgh 1912, p.649.

by interpretation. The possibility still remains that this gap may be filled simply by a clause in the articles ¹, and one would hope that such a clause regulating more explicitly the increase of capital and providing for doing so by increasing the nominal amount of the previously issued shares would not be interpreted as being contra legem. The other possible way would be by suitable interpretation of the phrase "... consolidate and divide" of S.61 (1)(b). Though this was primarily meant to cover one of the forms of reorganisation of capital ², it could, it is submitted, bear a secondary interpretation as "consolidation through increase". Such an increase-cum-consolidation of a l l the share capital in order to divide it up into shares of l a r g e r amount than its existing shares could be achieved uno flatu. If this interpretation could be accepted ³, one would simply have another example of parallel terms : since "diminution" of the share capital ⁴ is recognized side by side with "reduction" ⁵, two forms of "augmentation" could theoretically be admitted also : namely, the "increase by new shares" ⁶ and the "increase-cum-consolidation" ⁷ without any issue of new shares.

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1. The text of Art.44 of Table A (C.A.1948) does not solve this problem in a definite way, since it is ambiguous. The phrase "... increase ... by such sum to be divided into shares of such amount" does not touch the question whether these shares are new shares, or merely the previously issued ones.
 2. Cf. supra p. 61, and Gore-Browne, p.538.
 3. G.W.Wilton, Alteration of the memorandum of association, Edinburgh 1927, p.53, is opposed to this interpretation.
 4. C.A.1948, S.61 (1)(e) and (3).
 5. C.A.1948, Ss.66 ff.
 6. C.A.1948, S.61 (1)(a) and S.63 (1).
 7. C.A.1948, S.61 (1)(b) and S. 62 (1)(a).

The third pre-requisite is that notice must be given by the company to the registrar ¹ within fifteen days after the passing of the above mentioned resolution. The registrar is obliged to record the increase. Such a notice must include all particulars about the classes of shares affected and all the conditions of the new issue. A copy of the resolution authorizing the increase has to be appended to this notice. Nothing else is explicitly said ². Thus, one can presume that there is nothing to prevent an increase of capital although the authorized share capital has not yet been fully issued ³, and that there is no connection between the amount of subscribed capital (in the framework of the previous amount) and the admissibility of raising additional capital. Two aspects, quite different from each other, have to be pointed out in this connection. There may still be some unissued portion of the previously authorized share capital which could be utilized for an increase of capital, without having to observe all the necessary formalities ⁴; or, the capital may not yet have been fully paid up by the shareholders ⁵. Similarly, it can be said that the fact that

1. C.A. 1948, S. 63 (1).

2. Table A is bare of any additional requirements. They may, of course, occur in the individual articles of association.

3. S.W.Magnus and M.Estrin, The Companies Act, 1948, 2nd ed., London 1951, p.67. A different opinion is expressed by John Montgomerie, Steven's Elements of Mercantile Law, 11th ed., London 1950, p. 219.

4. Cf. supra pp. 71-72.

5. Levy (p. 787) overlooks the existence of these two aspects. He says : "the capital may be increased even though the original a u t h o r i z e d capital is not fully p a i d - u p". One should extend this in two directions, and add that the capital may be increased even : 1) though the authorized share capital may not yet have been all issued (Levy, p. 788), or 2) though the capital is not fully paid up.

there has been a previous increase (either through issue of shares within the framework of the authorized capital), or by a previous resolution in general meeting) does not exclude the possibility of further increase ¹.

The opinion has been expressed, and is still regarded as sound, that there is no obligation on the company to offer these new shares to the existing shareholders, unless the articles so provide. This opinion, as mentioned above ², is based upon the fact that the clauses ³ dealing with this question ⁴ were omitted from the Companies Act of 1948 ⁵, thus confining this obligation either to companies established under former Companies Acts, when a previous Table A was part of the company's constitution ⁶, or to companies with articles of association explicitly imposing an obligation to offer new shares to existing shareholders. This was done following the general business practice that pre-emptive rights should inconvenience ⁷ the company only in those cases where these rights were explicitly conferred ⁸. It is interesting to note that this right of

1. Levy, pp. 787-788,

2. Cf. *supra* p. 57.

3. A.Glynne-Jones (The Companies Acts 1862 to 1900, London 1902) and P.F.Simonson (Revised Table A, London 1907) called the units of the Table A "clauses", A.C.Bennett (in his remarks in "Scots Law Times") used two expressions: "clauses" and "regulations", other authors adopted various names for them.

4. C.A.1929, Table A, Art. 35-36. Cf. *infra*, p. A 17, footnote 2, and p. A 18, footnote 1. As a matter of fact, both these regulations are still in force in Northern Ireland. Cf. Annex I, *infra* p. A 18, footnote 1.

5. Minutes of evidence taken before the Committee on Shares of no par value, London (HMSO) 1954, p. 14.

6. On the applicability of a previous Table A see the remark by A.C.Bennett: "Company Law, Perplexities of the Statute", in: SLT (1936), p.70.

7. Gore-Browne, p. 878. Cf. *supra* p. 57.

8. The same trend is observable in some of the American statutes too, although the Common Law is in favour of a widely recognized pre-emption. Cf. e.g. the statutes of California, Michigan and Pennsylvania.

the shareholders to have new shares offered to them, though previously known in Scots and English Law ¹, and recognized in statute law ², never had a proper name until quite recently, when the American coining of "pre-emptive rights" was introduced ³ into British juridical literature ⁴. Though this institution was relegated to the First Schedule in 1862 ⁵, and though in 1908 the rather futile ⁶ limitation "subject to any direction to the contrary" was introduced ⁷, it is curious to note that there are two, almost disused, United Kingdom statutes ⁸ where this institution of pre-emptive rights is still preserved - the already mentioned Companies Clauses Consolidation Acts of 1845.

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1. A.B.Du Bois, *The English Business Company after the Bubble Act 1720-1800*, New York 1938, p. 395 (69), and p. 396 (72).
 2. Cf. *supra* p. 66, note 2.
 3. A.B.Du Bois asserts (*op.cit.*, pp. 278-279 (203 and 213), p. 340 (163) and p. 356) that the term "pre-emption" was known in Scotland and England at the end of the eighteenth century. The fact is worth noting that this same expression appears in very early American sources as well.
 4. Levy, pp. 787 and 795-797.
It is worth while noting in this connection that there is a difference in attitude between American Law and British statute law. While American Law uses the expression "pre-emptive rights" (cf. e.g. the statutes of California of 1951, marginal note to § 1106 ; Michigan - 1951, S.31 ; New York - 1952, §35 (3)(4), Pennsylvania - 1951, S.611 ; and Wisconsin - 1953, S.180.21), all the British sources speak only about an obligation on the part of the company.
 5. W.D.Rawlins and The Hon. M.M.Macnaghten, *Law and Practice in relation to companies under the Companies Clauses Acts 1845 to 1889, and under the Companies Acts 1862 to 1900*, London 1901, p.488 and footnotes.
Levy (p.795) erroneously called it "Table A", a name appropriated much later.
 6. Since the whole "Table A" is a standard form of articles of association with the provision that if and in so far as a company should not have drawn up articles of its own they are to be applied, it would be really useless to insert in "Table A" any "subject to"-clauses. Cf. Levy, p. 346.
 7. Levy (p. 795) erroneously asserted that this limitation came into being in 1929.
 8. 8 and 9 Vict., cap. 16 (S.58), and cap.17 (S.61). Cf. *supra* pp. 65-66.

It is interesting to consider whether these Acts of 1845 may be relied on in a way subsidiary to contemporary regulations, involving an obligation on the part of the company to offer new shares to old shareholders. The removing of Art. 35 and 36 out of the old "Table A" ¹ (a veritable collection of "ius dispositivum") could thus yield a quite unexpected result. There is still ground for argument as to whether these Acts of 1845 were ius cogens at all. Were they initially meant to be ius cogens ? ² What are they now ? It is also questionable whether the meaning of the phrase "... undertakings of a public nature in Scotland" has not acquired a new modified content to fit in not only with the modern notion of the nationalized sector of the national economy, but also with the modern notion of public companies ³. Since it is only very seldom that provisions of individualistic "articles of its own" exclude or limit these pre-emptive rights ⁴, an application of these above mentioned two Acts of 1845 could still, perhaps, be considered for the case where the individualistic articles of a public company are silent on this question.

The laconic style of the Companies Act of 1948 in these questions is evident in other problems too. Nothing is said in statute law about the contents of the resolution that should be passed in general meeting on an increase of capital. Nothing is said about the limits of discretion of the

1. C.A.1929, Table A, Art. 35-36. Cf. Annex I , infra p.A 17, footnote 2, and p. A 18, footnote 1.

2. Cf. e.g. the preamble of 8 and 9 Vict., cap. 17 : " ... save so far as they shall be varied or excepted by any such Act ..." .

3. Cf. supra p. 36, and notes 1 and 3.

4. Levy, p. 795.

directors in this respect ¹, nor is anything said about whether the regulations on formation of a company are applicable here per analogiam, and if so how far ; or whether regulations on successive formation and simultaneous promotion are applicable ². All these questions are left completely to the articles of association, and since they are generally silent on them ³, the general meeting is, in practice, usually left to determine them, besides determining the scope and contents of the resolution in all other relevant matters. Similarly, nothing is said in the Companies Act of 1948 as to whether the subscription of the full amount of the projected increase is a precondition of the validity of the increase ; nor is anything said about whether the principles governing the authorized capital are automatically applicable to the difference between the projected and the subscribed capital.

In addition, the company has a free hand concerning the par value ⁴ of

1. O.Griffiths and E.M.Taylor, The Principles of Company Law, London 1949, p.131.

2. Cf. supra p. 53 and note 3.

3. So also is Table A.

4. Unlike American Law, shares of no par value are unknown in Scots and English Law. The question does not at the present moment arise of how an increase of capital may affect no-par-value-shares. A recommendation to permit de lege ferenda the issue of ordinary shares of no par value was recently expressed by a special committee appointed by the President of the Board of Trade. Apparently following an American point of view (cf. supra p.22) that no-par-value-shares are an item of an "over-capitalized" upper layer of the corporate pyramid, it was suggested that the application of this new institution be limited to public companies only. That would mean, of course, an additional difference between public and private companies. This question was raised in Parliament on May 4th, 1956, and it seems now quite probable that future legislation will be favourable to no-par-value-shares. The latest summary of American theory on this question was given by C.L.Israels ("Problems of par and no par shares : a reappraisal", in :CLR, vol.47, pp.1279-1300), who came to the amazing conclusion that (p.1300) since "the basic conception of the nature and scope of liability are drawing together" it is no longer so important which type of share be issued. Cf. L.C.B.Gower, The principles of Modern Company Law, London 1954, pp.119 ff.; Board of Trade, Report of the Committee on Shares of no par value, London (HMSO) 1954, and Minutes of evidence taken before this Committee, p. 119.

the new share : it may be the same, but it may equally be either greater or less. There are, however, some regulations concerning the below-par increase ¹, a feature unknown in Britain before 1928 ².

It is possible for a company to issue new shares at a discount, provided a resolution is passed to this effect in general meeting ³. The resolution must specify the maximum rate of discount, and it must be sanctioned by the court ⁴. There are also two clauses which impose time limits on this type of issue ⁵ : firstly, it can be made only after the first year of business has elapsed, and, secondly, the issue must be completed within the very short space of one month after it is sanctioned by the court ⁶. Another limitation concerns the type of the shares : only shares "of a class already issued" ⁷ can be issued at a discount. Thus, preference shares cannot be issued at a discount when there were no preference shares prior to that increase, or no shares with exactly the same preference. Particulars about the discount ^{men} allowed and written off have to be ~~mentioned~~ mentioned in all subsequent balance

1. Cf. supra pp. 54-55.

2. Cf. Company Law Amendment Committee 1925-26, London (HMSO) 1926 (Cmd.2657), pp. 9 ff. and notes 45-46.

3. C.A.1928, S. 37 ; C.A.1929, S. 47 ; C.A.1948, S. 57.

The position prior to 1928 was unfavourable to an issue at a discount.

Cf. Chorley and Tucker's Leading cases on Mercantile Law, 3rd ed., London 1948, pp. 161-163 ; and Rauch, vol.I, Graz 1947, p. 56.

See also the report in : " The Scottish Law Review", Glasgow 1929, pp. 334 ff.

4. The price for a reissued share might be less than that paid for it before a forfeiture, if it was paid up to any extent by the former shareholder.

Cf. Gore-Browne, p. 537.

5. C.A.1948, S. 57 (c)(d).

6. This term can be extended, of course, with the sanction of the court.

7. Gore-Browne, pp. 197 and 521.

sheets of the company ¹. Another type of below-par-increase is represented by a commission ² payable by the company (up to 10%, if authorized by the articles), and provided that certain strict formalities are observed ³. Similarly, it is lawful for a company to pay brokerage ⁴.

On the other hand, one speaks about an above-par-increase if the new shares are issued at a premium ⁵, whether for cash or otherwise ⁶. The Companies Act is silent about the terms of payment, but there is no reason why any of the possible methods of payment should be excluded. The new shares can be paid either in full on application, or by instalments (usually at certain initially fixed intervals, or as and when the money is required by the company), either in cash, or for property and services, or in lieu of dividends, or by way of division of existing surpluses ⁷.

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1. There is a certain amount of lack of system in the fact that this S.57 precedes the sedes materiae concerning the increase of capital. Though it is applicable exclusively to the cases of increase, it was placed together with the only section on the issue of redeemable preference shares into a special subdivision sandwiched between "Commissions and Discounts" and the above mentioned "Miscellaneous Provisions". If ever a separate subdivision on "Increase of Capital" should come into being, the true place of this section would be at the end of it.
 2. "The Scottish Law Review", vol.45, Glasgow 1929, p.336.
 3. C.A.1948, S.53 (1)(c-d) and Fourth Schedule.
Cf. Levy, p. 387 ; Gore-Browne, pp.191 and 521. It is a comparatively rare occurrence when the shareholder receives additional shares in lieu of commission. Cf. Gore-Browne p.522. It is doubtful whether these could be called bonus-shares.
 4. C.A.1948, S.53 (3). Cf. Gore-Browne, pp. 191 and 521.
 5. Gore-Browne, p. 522 ; L.C.B.Gower, The principles of Modern Company Law ..., p.107.
 6. In both cases a sum equal to the aggregate amount or value of the premiums has to be transferred to a special share premium account. Cf. C.A.1948, S.56.
Cf. Gore-Browne, pp. 522-523.
 7. Though an increase of paid-up capital without any payment to the company is a theoretical variety of increase, the Court in Scotland refused in one particular case to sanction a rearrangement of the capital which was partly an increase without cash. See : Walker Steam Trawl Fishing Co., 1908 S.C.123.
Cf. Gore-Browne, p. 533 ; L.C.B.Gower, op.cit., p.108.

In this connection the question of the so-called "bonus"-or "gratis"-shares should be mentioned ¹, for in the framework of this study, this question only requires mention in connection with that of increase of capital. Though in principle an issue of bonus-shares is ultra vires in Britain ², the amount of exceptions has grown tremendously with time, and the impression sometimes prevails that the practice of issuing them in connection with an increase of capital is a quite normal one, though in certain cases the consent of the Treasury is required to such an issue ³. It is submitted that an issue of bonus shares to new subscribers or old shareholders is equivalent to issuing shares at a discount ⁴, and, since such an issuing is inadmissible except in the few cases where it is authorized by the Companies Act ⁵, there is not much scope for an application of this institution. It is, perhaps, rather a mistake to treat bonus

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1. It is a very unsettled question whether there is any terminological difference between them. Some authors on the Continent used the term "gratis shares" to denote new shares issued partly or fully without payment in cash (either in lieu of dividends, or out of surpluses), while "bonus"-, founders' or formation-shares were considered to be those issued at the very beginning of a company gratis in consideration of services rendered. In Britain a reverse terminology has been adopted, though not meticulously observed : bonus shares are those which are sometimes issued in connection with an increase, but gratis-shares (very rarely can this term be found here !) are those which are issued to founders and promoters during the formation of a company. Levy (p.404) and M'Neil (Mercantile Law of Scotland, Edinburgh 1949, p.339) use the term "bonus-shares" apparently for both purposes. It may be that the British term "bonus-shares" originated from the title of bond-holders to a bonus out of profits (Gore-Browne, p. 522) and the bonus-shares were initially only those which were given in lieu of a bonus in cash. Cf. supra p. 55, notes 4 and 5.
 2. W.Horowitz, "Historical development of Company Law", in : LQR, vol.62 (1946), pp. 384-385 ; Levy , p.404.
 3. S.W.Magnus and M.Estrin, Companies Act, 1948, 2nd ed., London 1951, p. 67.
 4. Gore-Browne, p. 521, in fine.
 5. Levy, p. 362. Cf. supra pp. 80-82.

shares as being one of the cases of "below"-par-issuings¹, since, seen from the accountant's point of view, the question whether an increase is a "below"-par, or an "above"-par-increase is answered entirely by a comparison of the "par" value of the increased capital with the "sale" value of it. It is completely immaterial whether this "sale"-value is due to a cash payment, or in consideration of property or services, or to a capitalization of profits, or to a capitalization out of a capital redemption fund² or a share premium account³, but it has to be a "valuable consideration"⁴. In all these cases this "sale"-value can be either "below", or "above", or even equal to the "par"-value. Since, however, the issuing of bonus shares comprises those cases of an increase of capital which are neither wholly for cash, nor wholly for property or services, nor a mixture of both, - but may represent a case where the value of the share was partly covered by a cash payment and partly by a transfer from a fund or account⁵ of the same company in question, it may happen that the "sale"-value of an increase with bonus shares is "above" the "par"-value of it. It has to be agreed that usually it is below, but it can be above too. Thus, the conclusion may be reached that bonus shares issued by increasing the capital of a company are accepted in practice, generally in the case of a

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1. This point of view is held also by Levy (p.404), although it could be pointed out that he speaks there (pp.404-405) only about founders' shares. Cf. also Levy, p.163.
 2. Cf. Infra p.111.
 3. Gore-Browne, p.521.
 4. Gore-Browne (p.522) points out that it is unlawful to issue bonus shares to bondholders (cf. supra p.83, note 1) when there is no profit, or the consideration is illusory.
 5. Thus, an increase by bonus shares is wholly or partly an increase out of the company's own means (G.: " ... aus Gesellschaftsmitteln").

revaluation of capital assets ¹, or a capitalization of profits ², provided only that the consideration on which this operation is based is not an illusory one. The theory still prevails that there is some kind of contract that protects the shareholders of bonus shares ³.

Another problem arises out of the increase of capital, namely, the rights of the shareholders of the new shares. One says that the new shares "rank pari passu" when it is meant that there is no difference between the old and the new shareholders as regards their respective rights. The Companies Act is silent on this point, and, provided that there is nothing in the memorandum to restrict or limit the company's choice ⁴, it is at the company's discretion how to rank the new shares in this respect. Preference shares may have been issued at the formation, or at a previous increase. The new shares may rank pari passu with one of the existing group of shares but they may also, partly or wholly, form a new group of their own ⁵. If

1. C.M.Schmitthoff, "Distribution of revalued capital assets of a company", in : "The Solicitor", vol.18, London 1951, pp. 135 ff.

2. The varieties known as : bonus shares out of capital redemption fund, or bonus shares out of share premium account (Gore-Browne, p.522), or bonus shares in lieu of dividends, come in the end under the same cover.
Cf. the reports : "Capitalisation of profits and similar questions", in : SLR, vol.35 (1919), pp.227-230 ; vol.42 (1926), pp. 94 ff.; and in : "The Law Times", vol.147 (1919), pp.60-61.

3. Gore-Browne, pp.521-522.

4. Palmer, p. 70.

5. A quite recent development shows that a new group of shares created increasing the capital may mean not only a difference concerning voting rights, or preferential dividends, or a preferential treatment at a winding-up, but also concerning the "shareholdership" itself, e.g. by allocation of the whole issue to the trustees of the Staff Pension Fund, as it was done recently in the case of the Assam Company. Cf. L.C.B.Gower, "Corporate Control : The battle for the Berkeley", in : HLR, vol.68 (1955), p.1192, note 60 ; and L.C.B.Gower, "Company Directors and Take-over Bids", in : "The Listener", vol.Lv, London 1956, p.21.

the rights attached to any class of shares previously created (either at formation, or at a previous increase of capital) are defined by the memorandum of association, these rights cannot be modified in any way, unless the memorandum indicates the way and manner of modification. An exception to this rule is given by the Companies Act, S.206¹, which provides a possibility of an arrangement, sanctioned by the court, which may mean a relief².

Preference rights usually concern dividends ; they may, however, concern surplus assets divided at a winding-up, or voting rights as well. The preference in the matter of dividends is merely a priority, and never a vested right of the shareholders irrespective of the amount of profits earned³. The resolution concerning the increase of capital usually also gives particulars about the time when the new rights of the shareholders become effective. The usual way nowadays is to mention in the articles of association (either in an original article, or one added by special resolution) that the company is authorized to issue preference shares. This authorization may also be contained in the memorandum of association, but it is less often that this happens, since an alteration of the memorandum is more difficult. In principle the memorandum can be altered only with the assent of the court, unless the same memorandum provides procedure for alteration.

1. Cf. Annex I, infra p. A 14.

2. H.Farrar, Company Law, 2nd ed., St.Albans 1930, p. 143.

3. Levy, p. 561.

A special type of preference shares is the redeemable preference share ¹. A special clause in the articles of association has to state whether such shares are redeemable at the option of the company, or compulsorily. A special new issue of shares can later be created for the specific purpose of enabling the redemption of these shares to be made out of the proceeds of such an issue, but the more normal way is to do it out of profits which would otherwise be available for dividends. The company is generally authorized to use the special capital redemption fund to pay the par value of these shares, and to issue new shares in place of the redeemed ones to existing shareholders as bonus shares ².

Much greater attention is attributed in the 1948 Act to the subject of reduction of capital. Formerly the basic approach was that the company was not entitled to diminish the fund liable to the creditors ³ and that there was an obligation to preserve the integrity of the capital as the creditors' guarantee fund by insisting that the company should not use its assets for any other purpose but those mentioned in the memorandum ⁴. The Companies Act of 1862 did not even contemplate the possibility that a company might be overcapitalized, and that there might be a wish to return a part of the capital to its shareholders by reduction

1. C.A.1948, S.58; C.A.1929, S.46.

2. Levy, p. 566.

3. Palmer, p. 73 ; H.Thring, The Joint Stock Companies Act, 1856, London 1856, p.55.

4. L.C.B.Gower, The principles of Modern Company Law, London 1954, p.109.

of capital ¹. Thus, under the cover of the ultra vires doctrine ² any repayment to the shareholders was considered as invalid, since the idea of a creditors' guarantee fund would become illusory by the very possibility of a reduction by repayment.

As mentioned above ³, there is a complete sub-division entitled "Reduction of Share Capital" ⁴ in which, besides presenting the regulations, the importance of this type of alteration of capital is emphasized ⁵. But although the greater part of the relevant material is indeed presented in this subdivision, there is no unified system in it. There are, at least, three items that are not included in it : - two of them - (1) the condit-

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1. W.Strachan, " The return of a company's capital to its shareholders", in : LQR, vol.26, London 1910, pp. 231-232.
 2. Cf., however, W.Horowitz, "Historical development of company law", in : LQR, vol. 62 , London 1946, pp. 375-386.
 3. Cf. supra p. 71.
 4. C.A.1948, Ss66-71. Cf. infra Annex I, pp. A 6-13.
See also the commentaries on this sub-division in : Buckley on the Companies Act, 12th ed., London 1949, pp. 152-165.
 5. The greater interest shown in Great Britain in reduction of capital can be seen not only from the more detailed and elaborate treatment in statute law, but also from the amount of books, articles and other publications specially devoted to this question. While one can find only one special legal study covering all types of alteration of capital, and none treating especially the problem of increase of capital, - the book by P.F.Simonson (The Law relating to the Reduction of Capital) has run to as many as three editions (1st ed., London 1911, 2nd ed., London 1924, 3rd ed., London 1932). The legal study mentioned above, that covers all the types of alteration ~~of~~ of capital, is that by G.W.Wilton, Q.C. (Alteration of the Memorandum of Association, Edinburgh 1927). Another work, namely by P.L.Reed and C.Wright (Alteration of Share Capital, London 1934), is rather a secretarial vade mecum than a legalistic study. Both of them, however, devote the major part of their space to questions about reduction of capital. The same trend can be observed in Switzerland too, where authors were complaining about the lack of interest in problems of increase of capital, except, perhaps , the special questions of bonus shares and pre-emptive rights.

ional cancellation of the uncalled capital ¹, and (2) the diminution of capital by cancellation of untaken shares ², can be found among the miscellaneous provisions of the previous sub-division ³, but the third one - which is a reduction of capital represented by those shares of the company which were purchased by the company itself by the order of the court ⁴ - is placed at the end of part IV of the Act ⁵. In dealing with "cancellation" the legislature appears to have introduced two shades of meaning for the same notion ⁶: since instead of "reduction" that section speaks rather about a "diminution" of capital. This distinction first appeared in 1877 and 1879 ⁷, and the only reason for it appears to have been that in this particular case the usual confirmation by the court was not required. ⁸ But the introduction of this new term "diminution" into the text of this section ⁹ seemed to be unsafe for interpretative reasons. Therefore a special clause was appended, saying that "a cancellation of shares - shall not be deemed to be a reduction" ¹⁰. Such a method is not unknown in other systems of law too.

1. Some authors call it : creation of a reserve liability. Cf. Buckley, op.cit., pp. 146-147.

2. Cf. infra p. 91, note 4.

3. C.A.1948, S. 60 and S. 61 (1)(e).

The heading of this sub-division is : "Miscellaneous Provisions as to Share Capital".

4. Gore-Browne, p.610.

5. C.A.1948, S.210 (2). Cf.infra pp.108 ff.

6. Cf. supra p. 75.

7. C.A.1877, S. 5 ; and C.A.1879, S. 5. Cf. infra Annex I, pp. A 2-3.

8. R.R.Formoy, The historical foundations of modern company law, p.137 ; Wilton, p.59.

9. "... and diminish the amount of its share capital by the amount of the shares so cancelled ...".

10. C.A.1948, S. 61 (3) ; C.A.1877, S. 5.

Cf. H.Farrar, *Company Law*, St.Albans 1930 ; O.Griffiths and E.M.Taylor, *The Principles of Company Law*, London 1949, pp. 132-133.

Although reduction of capital, as introduced into the Companies Act of 1867¹, has always had one characteristic distinguishing it from increase of capital, namely, the requirement of confirmation by the court, this difference was later lessened when no provision was made for confirmation by the court for two new types of reduction, created in 1877 and 1879, respectively².

The other characteristic distinguishing reduction from increase was the requirement of a special resolution³, but this was introduced only in the 1929 Act, in which it was provided that a simple resolution in general meeting was sufficient⁴ for both increase of capital⁵ and cancellation of untaken shares⁶. The pre-requisite common to both, the increase and the reduction of capital, was, of course, authorization by the articles⁷. An authorization by the memorandum was considered as insufficient⁸. Thus, where no authorization was provided in the articles, it had to be obtained

1. C.A.1867, S.9.

2. C.A.1877, S.5 ; C.A.1879, S.5. Cf. supra p. 89.

3. This requirement is automatically linked with a three quarters majority of those present and entitled to vote. This is a majority, not a quorum, requirement. Cf. Levy, pl 804.

4. Cf. Levy, p.787.

There was no difference up until then, since in all cases a special resolution was required. Cf. supra p. 73, note 5.

5. C.A.1948, S.61 (1)(a).

6. C.A.1948, S. 61⁽¹⁾(e).

7. Older Companies Acts referred both to the originally framed articles, and to later amendments. This phrase was omitted in 1907.

8. Simonson, p. 16 ; Wilton, pp. 73 ff.

by another special resolution altering the articles to this effect. Both resolutions could be passed at the same meeting ¹, though not uno flatu ². Table A contains this authorization ³.

The Companies Acts stressed from the beginning that a company may reduce its share capital "in any way" ⁴ it pleases, and to this end it may even do things that otherwise are forbidden, including a purchase of the shares of the company itself, or a rearrangement of the rights of shareholders, or an unequal subdivision of shares ⁵. One has to note in this connection that while concerning the increase of capital the stress is put on the words "by new shares" ⁶, nothing of that kind is mentioned in connection with a reduction. Thus, any reduction can be either a diminution of the nominal amount of the shares, or a cancellation of whole shares, or partly by one and partly by the other way. The stress in the text of the Companies Act lies rather in the relationship between reduction, liability, and items of the balance sheet than in the technical and formal question of how to achieve it. The list of the most usual ways is given in section 66 of the Act ⁷, and two other types of reduction are provided for in Art.46

1. Prior to 1929 that had to be done in two separate meetings.
Cf. A.C.Bennett and R.A.Bennett, *The Companies Act 1948*, Edinburgh 1950, p.120 ;
Gore-Browne, p.520 and p. 526, note 34 ; Simonson, p. IV (3).

2. M'Neil and Lillie's *Mercantile Law of Scotland*, Edinburgh 1949, p.125.

3. Cf. Annex I, infra p. A 18.

4. It is questionable whether the expression "in any way" could possibly include the diminution by cancellation of unissued shares mentioned in S.61 (1)(e) and (3) of the Companies Act of 1948. See the comments on a recent Scottish case, *Ormiston Coal Co.*, 1949 S.C.516, in : SLT, Edinburgh 1950, pp.13-14, where the articles of association provided the authorization for a reduction, but not for a cancellation of unissued shares.

5. Gore-Browne, p.524 ; Levy, pp.619-620 and p. 806 ; Wilton, pp. 70 ff.

6. Cf. supra p. 74.

7. C.A.1948, S.66 (1)(a-c).

of Table A ¹, but this enumeration is not exhaustive of possible ways and types ². The main types mentioned in S.66 of the Act are the following:

- a) reduction by extinguishing or reducing the liability of the shareholders in respect of not yet paid-up capital ³,
- b) reduction by cancellation of paid-up capital which is lost or unrepresented by available assets,
- c) reduction by repayment of paid-up capital which is in excess of the wants of the company ⁴.

There is, however, some lack of system in formulating these types ⁵. While types "b" and "c" differ only in the economic background to the reduction of capital ⁶ and in the possibility of a partial repayment of the capital to the shareholders, but not concerning the portion covered by the reduction ⁷, type "a" was designed for the "not yet paid-up"-portion only, irrespective of the reason for the reduction. While types "a" and "c" are resorted to by prosperous companies, type "b" is by unsuccessful companies ⁸.

Expressing these types in symbols we can draw up the following

schema :

1. Cf. Annex I, infra p. A 18.

2. From this point of view the formula of the preamble of S.61 (1) indicates much more the exclusive character of that enumeration than that in the formula of S.66 (1). Cf. Simonson, p. 17.

3. Cf. infra p.106, note 7.

4. Cf. Levy, p. 805.

5. C.A.1877, S.3, had a much more logical wording. Cf. Annex I, infra p. A 6, note 7.

6. Cf. supra p. 39.

7. In both cases "b" and "c", the reduction could only concern either the paid-up capital, or partly the paid-up and partly the not yet paid-up areas.

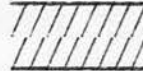
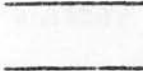
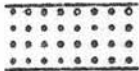
8. Simonson, p. 17.

L E G E N D :

erent meanings of "capital":

Different "styles" of reduction :

ssued or taken shares :



Paid-up capital.

Uncalled or not yet paid-up capital.

Unissued or untaken capital.

Reduction of capital lost or unrepresented by available assets.

Conditional reduction and repayment of capital.

T y p e s o f r e d u c t i o n :

S.60: Conditional reduction of the whole uncalled capital :



I.

S.60: Conditional reduction of a part of the uncalled capital :



II.

S.61 (1)(e) : Reduction by cancellation of untaken shares :



III.

S.66 (1)(a):Extinguishing of the liability :



IV.

S.66 (1)(a) : Reduction of the liability :



V.

S.66 (1)(b) :Reduction of paid-up capital :



VI.

S.66 (1)(b) : Reduction of paid-up capital with extinguishing of the liability :



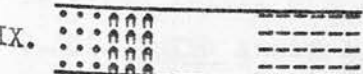
VII.

S.66 (1)(b) : Reduction of paid-up capital with reduction of the liability :



VIII.

S.66 (1)(c) :Reduction and repayment of paid-up capital :



IX.

S.66 (1)(c) : Reduction and repayment of paid-up capital with extinguishing of the liability :



X.

S.66 (1)(c) : Reduction and repayment of paid-up capital with reduction of the liability :



XI.

As mentioned above ¹, these eleven types of reduction are far from being the only possible ones ².

Except for the cancellation of untaken shares ³, in all other cases, whether mentioned in the above schema or not, a special resolution is required ⁴, and, except for the first three types mentioned above ⁵, confirmation by the court is required ⁶. Though Table A is silent in this respect, it would be unwise to presume that no confirmation by the court is required for the two types of reduction which are mentioned in Art.46 of Table A ⁷, or for any type of reduction not included in the above schema. ⁸ Concerning the two new types mentioned in Art.46 of Table A ⁷ one could, of course, assert that they are, properly speaking, not types of reduction of capital at all ⁹, being in set terms, a reduction of the capital redemption reserve fund in the one case, and in the other case, a reduction of the share premium account ¹⁰.

1. Cf. supra p. 92, note 2.

2. Gore-Browne (p.524, note 19) quotes a rather unusual type of reduction, where the amount returned, or a part of it, is considered as a payment off of capital "upon the footing that the amount ... may be again called up". Such a reduction is partly a reduction with repayment (Types IX-XI), and partly a retaining of an authorized capital above the level of the reduced paid-up capital. Another possible combination is that where the repayment (Types IX-XI), or a part of it, is considered as conditionally reduced (Types I, or II). Cf. also Wilton, p. 79 and note 5.

3. Type III, Cf. supra p. 93.

4. Art. 46 of "Table A" also embodies the requirement of a special resolution.

5. Types I-III. Cf. supra p. 93.

6. Cf. supra p. 90.

7. Cf. infra Annex I, p. A 18.

8. Gore-Browne, p. 524.

9. Cf. infra pp. 110 ff.

10. On the difference between "share capital" and "share premium account" see also : L.C.B.Gower, The principles of modern company law, London 1954, p. 107.

Thus, in both these cases, since they are not specifically mentioned in S.66 (1), the preamble to the subject of Reduction of Capital, one could infer that the articles of association may provide for a procedure not involving confirmation by the court ¹. In all the other cases it is doubtful whether articles eliminating this requirement could be considered as valid, even if they referred to a type not mentioned in S.66 ², since this list is not exhaustive, and the preamble covers any type of reduction that should come within the framework of this subdivision ³.

Initially it was supposed, of course, that the requirement of confirmation by the court was established primarily for the benefit of the existing creditors ⁴ whose position might be affected by the reduction of the share capital. Only much later was it realized that not only the creditors but the shareholders as well might be interested in the reduction ⁵. The principle that the court will, of course, refuse its confirmation when an

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1. Though Rule 5 of the Order L III B (cf. Annex II, infra p. A 19) treats both these cases separately from the usual types of "reduction of capital", Rule 10 foresees the possibility of applying by summons for directions as to the proceedings to be taken, and (2)(b) empowers the Judge to "order an inquiry as to the debts, claims or liabilities", i.e. to apply fully or partly the regulations of S.67 (2) of the Act, in these both cases too. These Rules of the Supreme Court are, of course, applicable in England only. Both sections in question, i.e. S.56 (1) and S.58 (1)(d), though containing clauses which are subject to "the provisions of this Act relating to the reduction of share capital" know exceptions (cf. Gore-Browne, p.199 and note 373, and the final part of p. 522), and these could consist in a procedure without any confirmation by the court.
 2. Levy, p. 807.
 3. C.A.1948, Ss 66-71.
 4. Levy, p. 801, in fine.
 5. Gore-Browne, p. 524 ; O.Griffiths and E.M.Taylor, The Principles of Company Law, London 1949, pp. 134 and 137 ; Levy, p. 807 ; and G.Todd, "Some aspects of Joint Stock Companies 1844-1900", in : "The Economic History Review", vol. IV, London 1932-34, p. 67 and note 4.

injustice may be done either to the creditors, or to a minority of the shareholders ¹, has now become an axiom. There is no provision in the Companies Act that the reduction should ^{be} spread equally or rateably over all the shares ². One can even assume that the circumstances of voting in general meeting and the majorities of votes cast in class meetings have lost a great deal of their persuasive force upon the courts.

The extent of the court's freedom of action has been especially increased since 1929 when sub-section 3 of Section 56 was introduced ³. Until then the court had freedom to decide whether to apply the procedure laid down in "subs.two" ⁴ only in those cases where the reduction did not involve either a diminution of liability ⁵, or repayment of any paid-up capital to the shareholders ⁶, but in the above specified cases, i.e. diminution of liability or repayment of any paid-up capital ⁷, the court was obliged to apply the procedure of S.49 (1) of C.A.1908 ⁸ very strictly. Only in 1929, with the adding of the third sub-section ⁹ and a

1. Gore-Browne, p. 525.

2. Simonson, p. 17.

3. C.A.1948, S. 67 (3). Cf. infra Annex, p. A 8.

4. C.A.1929, S. 56 (2)(a-c)(i-ii) ; C.A.1948, S. 67 (2)(a-c)(i-ii).

5. Type V. Cf. supra p. 93.

6. Types IX-XI. Cf. supra p. 93.

This point of view emanated at first from the words " ... unless the court otherwise direct" of S. 4 (1)(1) of the C.A.1877 (cf. infra Annex I, p. A 7, footnote 6), and, later, from : " ... and in any other case if the court directs" of S.49 (1) of the C.A.1908, or S. 56 (2) of the C.A.1929, or S.67 (2) of C.A.1948 (cf. infra p. A 7).

Cf. O.Griffiths and E.M.Taylor, op.cit., p.135 ; and Wilton, p.95.

7. Types V and IX-XI. Cf. supra p. 93.

8. C.A.1877, S.4 (1)(1) , went even so far as to say that " ... the creditors of the company shall not ... be entitled to object or required to consent to the reduction".

Cf. Annex I, infra p.A 7, footnote 6.

9. C.A.1929, S.56 (3). Cf. infra Annex I, p. A 8.

reference clause in the previous subsection ¹, was the court free "having regard to any special circumstances" ² to direct "that subsection (2) ... shall not apply as regards any class or any classes of creditors" ³.

Linked with this increasing extent of the court's freedom of action ⁴ is the question of the formal requirements of the petition of the company for confirmation of its resolution for reduction of capital. A similarly minor point that should be mentioned in this connection is that the word "petition" was omitted from the appropriate section of the Act ⁵, and it might be supposed that the procedure could be by summons in future ⁶.

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1. Cf. Annex I, infra p. A 7, footnote 5.
 2. Evidence that a company is solvent is not sufficient to satisfy the court, and does not necessarily constitute a "special circumstance", though the court has in many cases dispensed with an inquiry when it was satisfied that cash in hand plus the value of any trust investments exceeded the company's liabilities and the amount of capital proposed to be returned. Cf. Gore-Browne, p. 529 and note 53.
 3. The result thus achieved is somewhat clumsy from the point of view of system. If the only cases where the application of the special procedure laid down in S.67 (2)(a-c) of the Companies Act of 1948 was formerly obligatory can now be evaded with regard to "... special circumstances", and this latter fact depends entirely on the attitude adopted by the court, then the same result, it is submitted, could be achieved, perhaps, by simplifying the preamble of S.67 (2) of the Companies Act and shortening it to a mere formula : "In any case if the court so directs : -".
 4. Levy, p. 805.
 5. Cf. Annex I, infra p. A 7, and footnote 4. This textual change was noted by : M.Finer and H.A.C.Sturgess, The Companies Act, 1948, London 1948, part L, p.186 ; Gore-Browne, p.528 and note 50 ; and M.Wheeler and G.Tribe, Changes in Company Law, London 1947, p.44.
 6. The Rules of the Supreme Court, however, still provide that procedure must be by petition in these cases. Similar provision is made in the Rules of the Court of Session in Scotland.
Cf. infra p. 98 and notes 1-2, and Annex II, infra pp. A 19-23.

In addition to the requirements of the Companies Act, special rules have been issued governing procedure for the reduction of capital, especially concerning the application of this section 67 (2) of the Companies Act of 1948. These special rules are contained in "Order L III B" of the Rules of the Supreme Court for England ¹, and in the Rules of the Court of Session for Scotland ².

Formerly it was essential to show in such a petition whether or not the amount of capital that is to be written off had been lost or was unrepresented by available assets ³, but now, undoubtedly influenced, at least in

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1. Cf. "The Annual Practice", vol. 69 (published by R.F. Burnand, B.G. Burnett-Hall and D. Boland), London 1952, pp. 989-1027.
The full text of this order and all its appendices is given besides in : S.W. Magnus and M. Estrin, The Companies Act, 1948, 2nd ed., London 1951, pp. 512-522 ; and in Palmer, pp. 745-752. An extract from these rules is appended to this study as Annex II (cf. infra pp. A 19-23).
The text of the former rules (The Rules of the Supreme Court 1929, Order L III B of 31st July, 1929) is appended to Simonson, pp. 61 ff.
 2. Cf. The Rules of the Court of Session, 1948, London (HMSO) 1948, and Act of Sederunt (Procedure under Companies Act, 1948), 1948, No. 2293 (S. 185).
Rule 208 (p. 74) provides that "... all petitions initiated in the Court of Session and falling within any of the classes following :
- (XI) Petitions under the Companies Acts other than Petitions in a voluntary winding up ... ,
shall be presented to the Inner House ...".
The rules mentioned under section 3 ("Companies"), i.e. Rules 220-236 (pp. 82-90) relate exclusively to winding-up procedure, and are not analogous to the English rules mentioned in Annex II of this study.
It is submitted that, perhaps, owing to the inapplicability of this "Order L III B" in Scotland, Scottish courts have been capable to lead a more healthy policy in all these questions. Cf. supra p. 48, note 2.
 3. Gore-Browne, p. 524.
It was considered then that so long as a company had its own reserve fund, it could not allege a loss of capital. Cf. "Reduction of Capital", in : "The Solicitors' Journal", vol. 48, London 1904, pp. 570-571.

part, by the much wider interpretation put upon the objects of the Companies Acts ¹, the court may even confirm a reduction when there is no loss of capital at all. The court may also go much further, and confirm a reduction which is not in accordance with the rights attached to the shares ² or sanction a purchase of shares by the company itself ³, or confirm a reduction where no class meetings of the various classes of shareholders have been held, though usually such meetings are the normal pre-requisites to a petition to the court ⁴.

This special procedure that can be applied in any case ⁵ consists of :
1) drawing up of a list of creditors ⁶ entitled to object to the reduction,
2) securing payment of either the full amount of the creditor's debt or claim, or of an amount fixed by the court ⁷, 3) the addition of the words "and reduced" to the company's name ⁸, and 4) placing an obligation on

1. Gore-Browne, p. 533.

2. If the rights attached to the shares are embodied either in the memorandum of association, or in the articles of association, but there is no provision for modification of these rights, S.206 of the Companies Act may be applied. Cf. infra p. 122, and Annex I, pp. A 14-15. See also Gore-Browne, pp.525 and 784 ff., and William Dixon Ltd., 1948 S.C. 514.

3. Simonson, pp.17-18.

4. Gore-Browne, p.532.

5. Cf. supra pp. 96-97, and infra Annex II, pp. A 19-23.

6. C.A.1948, S.67 (2)(b). Cf. Gore-Browne, p. 531 ; P.F.Simonson, A treatise on the law relating to debentures and debenture stock, London 1913, pp.314-316.

7. C.A.1948, S.67 (2)(c)(ii).

8. This practice has seldom been in favour and has been steadily discontinued. Cases when the court decides to make such an order are extremely rare nowadays. Cf. infra Annex I, p. A 9, footnote 4. See also : Gore-Browne, p. 531 ; Simonson, Preface, p. IV (2) ; and A.Stiebel, Company Law and Precedents, 2nd ed., vol.I, London 1920, pp. 773 ff. Wilton (pp.90 ff. and pp.103 ff.) gives a good review of the position of the "and reduced"-requirement prior to 1929.
Company Law Amendment Committee 1925-26, London (HMSO) 1926 (Cmd.2657), p.11.

all shareholders, and, if the company is wound up, possibly even on creditors ¹ also, to contribute towards the payment of a debt or a claim of a creditor, who, though having been entitled to object to the reduction² was through his ignorance of the proceedings not entered on the list of creditors ³. In this last case, where the company is wound up, the court has the peculiar right of making and enforcing calls on the contributories as if they were ordinary contributories in a winding up, thus acting, as it were, instead of the liquidator. This obligation of the shareholders to contribute after the winding up of a company ⁴ is in a way a relic of the partnership understructure.

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1. The expression "list of persons so liable to contribute" (C.A.1948, S.70 (1)(b)) avoids the mention of members or shareholders, and thereby stresses, though, perhaps, indirectly, that at the moment in question (i.e. after the winding-up) there are no longer any shareholders. On the other hand, the court may even include the other creditors in the list of contributors, and may do that on the ground that such creditors would have got less had the ignorant creditor presented his claim in time. This possibility would be excluded if S.70 (1)(a) is applicable, i.e. if the company is not wound up. Cf. infra Annex I, p. A 12.
 2. C.A.1948, S.67 (2)(a), contains the general formula that : "... every creditor who at the date fixed by the court is entitled to any debt or claim which if that date were the commencement of the winding up ... would be admissible in proof against the company, shall be entitled to object to the reduction". Other references to winding up procedure can be found in S. 67 (2)(c)(ii) and at the end of S.70 (1). Similarly, rule 11 of the "Order L III B" contains a series of references to winding up procedure. Cf. infra Annex II, p. A 21, rule 11 (a) and (b). This link of analogy between reduction and winding-up, not unusual in other systems of law too, has nothing in common with another question, namely, whether a company in voluntary liquidation is entitled to reduce its capital. This question is nowadays answered in the affirmative, since liquidation is only a stage preparatory for dissolution, but that does not necessarily mean that there may not be a return to life. Cf. Simonson, pp. 20-21.
 3. C.A.1948, S.70 (1)(proviso)(a-b). Cf. Gore-Browne, p. 531.
 4. C.A.1948, S.70 (1)(proviso)(b).

Thus, the court has the alternative either to decide not to apply S.67 (2) as regards creditors ¹, or ² to keep strictly to this procedure and to be satisfied, on the hearing of the petition, that every creditor entitled to object either has consented to the reduction ³, or that his debt or claim has been either discharged or secured in a manner directed by or acceptable to the court ⁴.

Nonetheless, it is the usual practice in England to have evidence at hand when the petition is heard, and an affidavit ⁵ is usually lodged explaining the reasons for the intended reduction ⁶, and giving particulars

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1. C.A.1948, S.67 (3). The presence of "special circumstances" has to be stated, though the court is apparently free to decide how these words should be interpreted.
 2. The court has no other power to dispense with the settling of this list of creditors. The choice is between these two possibilities. Cf. Gore-Browne, p. 530.
 3. Gore-Browne, p. 529, in fine. Cf. also rule 11 (f) and (i) (end of the first sentence) of the "Order L III B". Cf. Annex II, infra pp. A 22-23.
 4. It was suggested once that, similarly to some legal systems on the Continent, the confirmation by the court should in certain cases be granted only after the expiry of a specified period (hereafter in this study called "induciae") following the formal resolution in general meeting on a reduction of capital. Cf. C.L.Nordon, "The contemplated changes in Company Law", in: "The Law Times", vol. 164, London 1927/1928, p. 246.
 5. Particulars about the contents of such an affidavit are given in rule 11 (a) and (b) of the "Order L III B". Cf. Annex II, infra A 21. Usually such an affidavit also contains detailed information about the memorandum and the articles of association, the minutes containing the resolution for the reduction of capital, and also the last audited balance sheet. Cf. Gore-Browne, p. 532.
 6. The court may, of course, direct publication of the reasons for reduction. This possibility was mentioned in S.55 of C.A.1908. In Scotland it was never required, and in England extremely seldom. Cf. H. Burn-Murdoch, Notes on English Law as differing from Scots Law, Edinburgh 1924, p. 52 ; and Wilton, pp. 96-97.

about the financial position of the company, sometimes with an appended valuation of the assets by an independent valuer ¹, usually stating that the assets retained by the company are adequate ². In Scotland, if no objection to the proposed reduction is made by any creditor or shareholder, the Court remits the proceedings to a man of business as reporter to consider the regularity of the procedure, and the facts stated in the petition, and, where creditors are concerned, to adjust the list of creditors in order that it may be settled formally by the court as the statutory list ³.

A projected reduction can be either sanctioned or disallowed by the court. Though any scheme considered as fair for the shareholders and creditors may be sanctioned by the court, and though the present trend is towards increasing the court's freedom of action and discretion, there are, however, some general principles which the court usually observes.

Thus, for example, reduction should not be used for ^a"writing down of the capital" in order to extinguish the remaining liability in cases where shares were issued at a discount ⁴. Again, where capital is represented by goodwill, it is usually not considered as being "unrepresented by available assets". Similarly, assets representing a reserve fund or a credit on profit and loss account will be treated as available assets. The apportionment of loss between the paid-up capital and the reserve fund is carried through on the principle that only that portion which is attributed to the paid-up

1. Gore-Browne, p. 532.

2. L.C.B.Gower, "Companies' Reduction of Capital", in : MLR, vol.14 (1951), p.331.

3. Green's Encyclopaedia of the Laws of Scotland, Supplement to Vol.1-9, pp.193-194. My attention to this regulation was drawn by David Maxwell, Esq., Q.C., lecturer in Mercantile Law at Edinburgh University, to whom I express my gratitude.

4. Gore-Browne, p.533.

capital will be considered as lost capital ¹. Special attention is given to the situations arising in cases of multiformity of shares ², and to the cases where reduction is linked with a repayment ³. The fact itself that there is a class, or are classes, of preference shares does not in the least mean that a reduction of the share capital should not affect them. And even though shareholders of preference shares have no voting rights (if such a class were created either at the beginning of the company, or at a subsequent alteration of the memorandum or articles), and could therefore not express their opinion in connection with a proposed reduction - this does not mean that a proposed reduction could not concern them ⁴. There are of course, cases where these preference rights indicate more or less precisely the way in which a reduction should affect different groups of shareholders, and what would be the role played by the holders of preference shares in the reduction procedure.

However, articles of association are generally silent about the principles to be applied in reducing the capital in the case of a multiformity of shares. The company has therefore a free hand in choosing the method, and it is entirely at the discretion of the court to confirm it, or not. Since preferences attached to one particular class of shares either concern dividends, or the distribution of capital at a winding-up, the principles applicable to a reduction refer usually to the principles in

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1. O.Griffiths and E.M.Taylor, The Principles of Company Law, London 1949, p.138.
 2. Preference shares are not necessarily treated in the case of a reduction in the same way as the ordinary shares. It is quite usual to give them a lower rate of interest upon the capital they originally brought into the business. Cf. Gore-Browne, p.526 ; and Palmer, pp.76-77.
 3. Types IX-XI. Cf supra p. 93.
 4. Palmer, p. 77.

connection with a winding-up¹. Therefore one of the widely accepted principles is that where preferences relate to priorities in capital, the holders of these preference shares should have preference at a reduction with repayment². This point of view expresses indirectly the idea that such a reduction with repayment is in its way a partial winding up without the application of the rather cumbersome procedure of a formal winding up³. In the reverse case, where preference shareholders have no preference rights as to the capital in the case of a winding up, a reduction-cum-repayment may affect the ordinary shares only⁴.

The minority right of the shareholders of a particular group of shares to apply to the court to have an already validly voted variation⁵ of shareholders' rights cancelled was introduced in 1929⁶. This right, however, is subject to two limitations : - firstly, it is only available

1. Cf. supra p. 100, note 2.

See also the case of Wilsons and Clyde Coal Co. v. Scottish Insurance Corporation, 1949 S.C. (H.L.) 90. It is curious to note that this is one of two cases that were recently cited and followed in Delaware. Cf. L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in : HLR, vol.69, Cambridge (Mass.) 1956, p.1401, note 163.

2. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p.122 ; and Gore-Browne, pp. 526-527.

3. Another type of reduction, i.e. one which is regulated in the newly created S.210, is also considered as an a d d i t i o n a l, not alternative, "remedy to winding up". Cf. Gore-Browne, p.609 ; and L.C.B.Gower, op.cit., p.1386, note 81. See also the William Dixon Ltd. case, 1948 S.C., pp.513-514.

4. O.Griffiths and E.M.Taylor, The Principles of Company Law, London 1949, p.138.

5. Variations in this section includes abrogation. Cf. Gore-Browne, p.431.

6. C.A.1929, S. 61; C.A.1948, S. 72. Cf. infra pp. A 13-14.
Cf. Gore-Browne, pp. 26-27, 431 and 867.

if the memorandum ¹ or the articles of association authorize it ², - secondly, it is in the court's discretion to grant or refuse the application. Thus, this minority right, given to holders of not less than 15% of the issued shares of the class concerned, is merely a right to have the matter investigated. It does not give an absolute right to have a variation of the rights of shareholders averted. It seems that a much more effective way to achieve a variation of these rights in connection with a reduction of share capital may be found in S.206 of the Companies Act ³, since it is applicable independently of provision therefore in the memorandum or articles, and may be initiated even by a single shareholder, or a single creditor ⁴.

The above mentioned eleven types of reduction ⁵ do not form a particularly coherent system, since even the conception of "capital" is

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1. It is usually considered undesirable to set out these rights and the procedure for their amendment and variation in the memorandum, though Art. 4 of Table A (1948) authorizes their variation. The point of view has been expressed that such a clause in the articles is valid "... where memorandum and articles ... are issued contemporaneously", but there is an opposite opinion that the memorandum itself has to authorize such alterations. Even the consent of all the shareholders concerned was sometimes considered as unsatisfactory, and the alteration thus achieved as invalid.
 2. Cf. A.C.Bennett and R.A.Bennett, op.cit., pp.126 ff.; Gore-Browne, p.867. See also : "Company Law and Practice, Modifications of class rights", in : "The Solicitors' Journal", vol.91, London 1947, pp.202 ff.; pp.213 ff.
 3. A.C.Bennett and R.A.Bennett, op.cit., p.127 ; Buckley on the Companies Acts, 12th ed., London 1949, pp.423-424 ; and Gore-Browne, pp.528 and 784-792.
 4. Cf. infra pp. 122ff.
 5. Cf. supra pp. 92-93.

not always the same ¹. In the first five types ² the amount of issued shares and paid up capital is not affected at all, and the whole procedure of reduction concerns in one or other way that part of the authorized capital which is beyond the paid-up "area" ³. Type III is the only one (out of these five) where the untaken capital is involved ⁴. In the other four cases ⁵ the procedure of reduction concerns the taken though not yet paid-up area. These four types differ in the way in which the liability of the shareholders is affected ; it may be conditionally ⁶, or irrevocably ⁷, amounting to the whole area of the not yet paid-up capital ⁸, or merely to a fraction of this area ⁹. There are, of course, some other possible types

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1. The conception of "capital" in Scots Law differs in one point from that in English Law, though very slightly : a "hypothecation" of the uncalled capital is possible under Scots Law only when it is provided for in the articles, but under English Law this possibility is presumed in every case. Cf. H. Burn-Murdoch, Notes on English Law as differing from Scots Law, Edinburgh 1924, pp.50-51 ; P.F. Simonson, The Companies Act 1900 with commentaries and forms, 2nd ed., London 1901, p.69 and note ; G.W. Wilton, Principal distinctions between the laws of England and Scotland, London 1923, pp.26-28.
 2. Types I-V. Cf. supra p.93.
 3. The schematic designs on p.93 indicate the presence of three different "areas" of capital : the paid-up, the taken though not yet paid-up, and the untaken. That does not necessarily mean that the presence of all three "areas" is essential in any particular case. Type III is the only one that is unthinkable without the untaken "area". Types VI and IX are quite possible even when the whole authorized capital is taken and paid-up. The word "area" is used here and later in this sense.
 4. The schematic design of this type on p.93 indicates the cancellation of the whole area of untaken shares. A cancellation of a part of this area is, of course, possible as well.
 5. Types I-II and IV-V.
 6. Types I and II.
 7. Types IV and V. These four types (I,II,IV,V) are extremely rare in practice, since uncalled or not yet paid-up capital seldom exists longer than for a few months. Therefore S.66 (1)(a) is by some authors considered as obsolescent. Cf. Minutes of evidence taken before the Committee on Shares of no par value, 1954, pp.172 and 175.
 8. Types I and IV.
 9. Types II and V.

where the reduced area would simultaneously cover partly ¹ or wholly the untaken area, and partly or wholly the not yet paid-up area of capital ².

In the case of the last six types ³, a reduction of the paid-up capital is involved. That means that in all these cases the area of reduction partly covers the paid-up area ⁴. These six types differ among themselves ⁵ in the extent to which they cover the not yet paid-up area of the capital ⁶, and whether the reduction involves a repayment ⁷. Further, as part of a scheme of reduction an extinction of dividend arrears can be mentioned. This is, of course, in a way a variation of the rights attached to that class of shareholders whose dividend arrears are threatened by this extinction, though it is more of the nature of an arrangement between the company and its shareholders in the sense of S.206 of the Companies Act ⁸.

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1. Types of such a "mixed" character may in quite exceptional cases cover the whole not-yet-paid-up area and partly the untaken and paid-up area.
 2. E.g. type I-cum-III, type II-cum-III, type IV-cum-III, type V-cum-III, etc. In the first two of these "mixed" types mentioned here, a functional difference will still, however, be observable: - the reduction by cancellation of untaken shares is rather an irrevocable one. In the case of such a "mixed" reduction it has always to be borne in mind that one has to proceed according to the rules set up for each part of the reduction. The law does not recognize any principle that facilities granted for one part (e.g. "no special resolution required" or "no confirmation by the court required") may be extended to the other part too. Cf. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p.119.
 3. Types VI-XI. Cf. supra p. 93.
 4. If the reduced area would cover the whole paid-up capital, it would be, quite naturally, a case of a winding-up.
 5. Cf. supra pp. 39 and 92.
 6. Types VI and IX are the cases where a reduction is confined to the paid-up area only; types VIII and XI are the cases where the reduction simultaneously covers partly the paid-up and partly the not yet paid-up area; and types VII and X are the cases where it covers partly the paid-up and wholly the not yet paid-up area of the capital.
 7. Types IX-XI.
 8. Wilton, pp.87-89.

In all these eleven cases, we are normally speaking about a reduction of the authorized capital ¹ though it is quite conceivable that in the case of repayment ² a reduction of the paid-up capital does not necessarily mean a simultaneous reduction of the authorized capital to the same amount, or the reduction of the authorized capital at all ³. The repaid-though-still-authorized area may cover the whole repaid area, or only a part of it. If it covers the whole repaid area, that means that there has been no reduction of authorized capital at all ⁴. A part of the reduced paid-up capital can also be retained as authorized capital ⁵. Similarly, it is possible that the retaining of this area or a part of it as authorized is a "qualified" one, e.g. with a clause "... except in the event and for the purposes of the company being wound up", in which case there would be a mixture of Types IX-XI with types I-II.

Some of the types of reduction are not included in the schema on p.93. Here there should first be mentioned reduction by purchase of shares by the company itself. This newly created type ⁶ envisages the right of any

1. Cf. supra p. 106, note 3.

2. Types IX-XI.

3. Gore-Browne (p.524, note) mentions two Scottish cases where the "authorized ceiling" was not lowered to the same extent as the "paid-up ceiling", or not lowered at all. Cf. supra p. 94, note 2.

4. This is possible only in the case of Type IX (cf. supra p. 93), since any extinguishing or reduction of liability (Types X-XI) automatically means a reduction of the authorized capital too.

5. This is possible in the cases of the types IX-XI. Cf. supra p.94, note 2.

6. C.A.1948, S.210, formerly S.9 of the C.A.1947 (10 and 11 Geo VI, cap.47). This amendment was accepted on the recommendation of the Cohen Commission. Cf. also : S.W.Magnus and M.Estrin, Companies Act 1948, 2nd ed., London 1951, p.208; M.Share, Company Law and Practice, The changes effected by the Companies Act 1947, London 1947, pp.12-13; M.Wheeler and G.Tribe, Changes in Company Law, London 1947, pp.5,10 and 57; the report in "The Law Times", vol216 (1953), pp.639-641.

shareholder to apply by petition for an order to investigate the affairs of the company. Such an investigation may be initiated by one shareholder alone, provided only that he is personally affected by the oppressive manner¹ in which the affairs of the company are being conducted². If the petition containing such a complaint is favourably considered by the court, but it also appears that a winding-up may unfairly prejudice that particular group of shareholders to which the petitioner belongs, the court is empowered to make such order as it thinks fit. It is most essential (as a prerequisite of the whole situation considered by the court) that "otherwise" the facts should justify an order for a winding-up on just and equitable grounds³, and that the only reason for an order was the probability of an unfairness towards the petitioner and other members of a group.

This power of the court is not restricted, and any order may be made⁴. The court may even make amendments of the memorandum or articles of association, and these amendments will have the same effect as if they were duly made by a valid resolution of the company⁵. The court may regulate the future conduct of the company's affairs in any way that may bring full relief to any oppressed minority of shareholders. It is also possible - and

1. As to the interpretation of the expression "oppressive" see : Elder v. Elder and Watson, 1952 S.C.49 ; and "The Law Times", vol.216, London 1953, pp. 639 ff.

2. Levy , p. 850.

3. Buckley on the Companies Acts, 12th ed., London 1949, pp.423-424 ; and Gore-Browne, pp. 588 and 609.

4. Two Scottish cases, one of them the above mentioned Elder v. Elder and Watson Ltd., are considered of being the only illuminating judgments on the applicability and value of S.210. Cf. L.C.B.Gower, "Corporate Control : The battle for the Berkeley", in : HLR, vol.68, p.1183, note 23, and "Some Contrasts between British and American Corporation Law", in : HLR, vol.69 (1956), p.1387 and note 82.

5. The effect of such amendments is even greater, since the company is not entitled to alter or amend them again without the permission of the court. Cf. Levy, p.850.

this especially concerns this study - for the court to order the purchase of the shares of any shareholder either by other shareholders, or by the company itself ¹. And in the latter case that means a reduction of the capital amounting to the value represented by the purchased shares. The peculiarity of this variety of reduction of capital lies not so much in its being a different "type" of reduction ², as in the otherwise unusual power of a body external to the company, i.e. the court, to regulate the affairs of a company at its discretion. As a matter of fact, however, this fits perfectly into the pattern of the trend mentioned above, -"away from partnership towards the upper class of the state's economy !" ³, and it may well be that the next step, in this trend, will be the creation of the office of the Public Shareholder ⁴, the epithet "public" thus receiving a new meaning too.

Two other varieties of reduction, not mentioned in the schema on p.93, are : a) the reduction of the capital redemption reserve fund ⁵, and b) the

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1. Gore-Browne, p.610 ; Simonson, p.18.
 2. Since a purchase of a share is in a way a repayment of paid-up capital, this variety would systematically and perfectly fit into types IX, or X, or XI.
Cf. supra p. 93.
 3. The gradual transfer of control from the courts to the Board of Trade is already an indication of this trend. Cf. Levy, pp.778-785 and p.857.
A different opinion is, however, expressed, namely, that from another point of view there is a reversion to partnership principles, since this S.210 of the Companies Act of 1948 gives the title to initiate an investigation of the affairs of the company to even a single shareholder.
Cf. "The Law Times", vol.216, London 1953, p.641.
 4. Levy, pp.857-858.
 5. Cf. Annex I, infra p.A 18 and footnote 4.
This institution was mentioned for the first time in S.46 and Table A of the C.A. of 1929, and was apparently set up as a safeguard against a reduction that might result from a redemption of shares. Cf. M.Finer and H.A.C.Sturgess, The Companies Act 1948, London 1948, part I, pp.183-185 ; V.H.Frank, Company Accounts, 2nd ed., London 1952, p.11.

reduction of the share premium account ¹. The opinion has been already expressed ² that they are not, properly speaking, varieties of reduction of capital, but are similar proceedings that have no direct effect on the amount of capital.

Concerning the first of these two cases, it should be noted that a redemption of preference shares is not considered as being a reduction of the amount of authorized capital ³, though provisions about reduction could be aptly applied ⁴. Though the amount of authorized capital is not affected by it, and though at the end of the day it will not even affect the amount of paid-up capital, it is still a manipulation of the capital items, and, though, perhaps, only transitorily ⁵, an alteration of the capital account in the balance sheet. In view of that, it is, nevertheless, in a way, a reduction of capital. Since a redemption is in itself a variety of judiciously planned repayment ⁶, one may assume that it is a variety of Type IX ⁷, or a "suspended" reduction with a probability of an immediately

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1. Cf. Annex I, infra p.A 18 and note 5. This institution was mentioned for the first time in Table A of the C.A. of 1948. Cf. M. Finer and H.A.C. Sturgess, *op.cit.*, pp.182-183; and M. Share, *Company Law and Practice ...*, London 1947, p.57.
 2. Cf. supra p. 95, note 1.
 3. C.A.1948, S.58 (3). Similarly, an increase of capital by creation of new shares issued to the shareholders (either to all, or to the ordinary shareholders only) as bonus shares is not considered as being an increase in the technical sense. Cf. H. Farrar, *Company Law*, St. Albans 1930, pp.146-147; Gore-Browne, pp.199 and 508; M. Wheeler and G. Tribe, *Changes in Company Law*, London 1947, pp.43-44.
 4. C.A.1948, S.58 (1)(d). Cf. A.C. Bennett and R.A. Bennett, *The Companies Act 1948*, Edinburgh 1950, p.123. Cf. infra pp.112-113.
 5. A good coining is, perhaps, the expression: "... temporarily capitalized accumulated profits". Cf. "The Law Times", vol.171, London 1931, p.148.
 6. Gore-Browne, p. 198.
 7. Cf. supra p. 93.

following, or even simultaneous, increase ¹, very often in the form of fully paid bonus shares issued to the shareholders ². Since these redeemable preference shares are issued on the terms that they are liable to be redeemed, the consent of the court is not required ³.

Similar in some respects to the previous variety of reduction is the reduction of the share premium account ⁴. However, while the capital redemption reserve fund is created during the life-time of a company and exists as a separate account in the group of capital accounts, the share premium account may be created at the very beginning of a company in order to comply with the requirements of S.56 of the Companies Act, or, speaking in terms of accountancy, in order to re-stabilize the amount of issued share capital by creating a new account in the group of capital accounts ⁵, though, like the capital redemption reserve fund, it may be used for paying up unissued shares that are to be issued as fully paid bonus shares. It is doubtful whether all the regulations on reduction of capital apply fully to the reduction of a share premium account even if one considers that this account is a part of the paid-up capital of the company ⁶. Since this

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1. A simultaneous reduction-cum-increase, elaborately provided for in some other systems of law, has the attractive advantage of being economical from the point of view of formalities and stamp duties, since the forms of Notice and Statement of Increase, otherwise required to be lodged with the Registrar, are not necessary in this case, neither is any stamp duty payable. Cf. Gore-Browne, pp.199 and 520 ; Simonson, p.57 ; Wilton, p.102. See also : "Company Law and Practice, Redeemable preference shares", in : "The Solicitors' Journal", vol.90, London 1946, pp.170-171.
 2. W.B.Abbott, Recent changes in Company Law and Accounts, Edinburgh 1929, p.25 ; and the report in "The Law Times", vol.171, London 1931, pp.148-150.
 3. H.W.Jordan and S.Borrie, Company Law and Practice, London 1901, p.166. Cf. supra p. 95, note 1.
 4. V.H.Frank, Company Accounts, London 1952, pp.11-13 ; Gore-Browne, p.507 ; M.Wheeler and G.Tribe, op.cit., p.44.
 5. Gore-Browne, p.461 ; C.M.Schmitthoff, "Distribution of revalued capital assets of a company", in : "The Solicitor", vol.18 (1951), p.136. 6. Gore-Browne, p.522.

account, unlike the capital redemption reserve fund, has never been a part of the share capital in any way, it does not fit into any of the types in the schema on page 93, and it is doubtful, to an even greater extent than in the previous case, whether a reduction of this account is a variety of reduction of capital in the sense of this study ¹. It accordingly seems that objection could be taken to its being grouped along with real reductions of capital in Art. 46 of Table A ². It is in no way an "alteration of capital" as the heading above Art. 44 indicates ³. If the previous case can be called reduction-cum-increase, there is in this case only an increase by adding to the capital of the company an amount that previously formed a special capital item, or a part of it.

There is, besides, another group of varieties of alteration of capital, that are sometimes considered as types of reduction ⁴ which should be considered in this connection. The question is whether forfeiture of shares, surrender of shares, and disclaimer of shares are types of reduction of capital, as it is asserted sometimes ⁵, or varieties of "alteration of capital" that should be classed as "reorganization of capital" ⁶.

None of these forms are regulated by the Companies Act. There is, however, a special heading "forfeiture of shares" in Table A ⁷. It is questionable whether forfeiture of shares is conceivable if Table A does

1. V.H.Frank, op.cit., p.12, in fine.

2. Cf. Annex I, infra p. A 18.

3. Cf. Annex I, infra p. A 17.

4. Gore-Browne, pp.534 ff., and p.875 ; Palmer, pp.130 ff.

5. Wilton (p.72) calls them the "indirect reductions".

6. Cf. supra p. 61.

7. C.A.1948, Table A, Art. 33-39.

not apply to a particular company, and if its own articles of association do not contain any or sufficient authority for the company to make a forfeiture valid ¹. The opinion has been expressed that it is still possible though only with the sanction of the court ², and, presumably, this opinion is based on the initial sentence of S.66 of the Companies Act of 1948 ³, and, to some extent, on the analogy between the forfeiture and a reduction-cum-extinction of liability ⁴. It is, however, quite as reasonable to argue that since this is not a variety of reduction of capital at all, the initial words of S.66 : "Subject to confirmation by court" should not be applied ⁵. This latter point of view is still sometimes adopted in systems of law where the partnership basis has been retained to a much greater extent, or where the rules regarding forfeiture can be deduced from the Common Law features of the contract between shareholders and their company. This point of view is no longer held in Scots and English Law, though, quite theoretically, it might still be canvassed.

Forfeiture of shares is always linked with penal proceedings for the non-payment of calls ⁶. Forfeiture is, from the shareholders' point of view the same process as repayment of paid-up capital ⁷ from the point of

1. Cf. R.Ashworth, Limited Liability Companies, London 1925, pp.275 ff.; W.E.Levie, A Handbook of Company Law in Scotland, Edinburgh 1926, pp.113 ff.; Palmer, pp.74-75; A.C.B(ennett), "Company Law, Forfeiture of Shares", in : SLT, 1938, p.213.

2. Gore-Browne, p.534.

3. Cf. supra pp.94-95.

4. Type X (cf. supra p. 93). Types IX and XI are not applicable in this case, since forfeiture is impossible either without an extinction of liability for the not yet paid-up area, or with a partial extinction only.

5. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p.121 ; Green's Encyclopaedia of the Laws of Scotland, Supplement to vol.1-9, Edinburgh 1949, p.186 ; O.Griffiths and E.M.Taylor, The principles of Company Law, London 1949, p.133.

6. Charlesworth, p.118 ; Gore-Browne, p.534 ; Levy, p.806.

7. Gore-Browne, p.869.

view of the company ¹. Therefore it is a reduction of capital by the amount of the paid-up part of the forfeited shares. It differs from the Type X of the schema on page 93 ² only in respect of the reason for the action : in one case, it is the result of an excess of capital over the wants of a company ³, in the other, it is the result of a non-payment of calls. Forfeiture is in its way a narrowly defined special variety of reduction, since it is applicable only in the case of non-payment of calls, and is not applicable for non-payment of any other debts ⁴. On the other hand, a very strict procedure is laid down ⁵. This counterbalances the privilege usually attached to forfeiture, namely, that it can be imposed by the directors alone ⁶, or, at least, by a simple majority of shareholders without any sanction of the court ⁷. Finally, a forfeiture may be a reduction-cum-increase ⁸, but it need not necessarily be so. Thus, the company may use the non-payment of calls as a pretext to reduce the capital by the amount of the forfeited paid-up capital ⁹, or a part of it. Art 37

1. In systems of law where the purchase of its own shares by the company is prohibited, forfeiture is usually considered as one of the exceptions to this rule.

2. Cf. supra p.93 and p. 114, note 4.

3. Cf. supra pp. 39 and 92.

4. Charlesworth, p.119 ; Gore-Browne, p.534.

5. Charlesworth, p.118 ; Gore-Browne, p.536.

6. C.A.1948, Table A, Art.33.

7. Gore-Browne, p. 534.

8. Charlesworth, p.119 ; Gore-Browne, p.537.

9. C.A.1948, Table A, Art.37.

of Table A preserves the post-forfeiture liability of a former shareholder, thus counteracting the possibility of a "strike" of the majority of shareholders ¹. In the absence of such a provision about post-forfeiture liability the former shareholder is freed from any liability at once, and that concerns past and future calls as well. It is interesting to note that the post-forfeiture liability, an institution deeply rooted in Common Law and partnership, survives in the field of Company Law only as an accidental and no longer as an essential characteristic of the relations between shareholders and company. It is curious to note that Art. 33-39 of Table A speak only about "members", thus inadvertently stressing that these rules, if applied, regulate the membership side of the relations between shareholders and company.

The second member of this group of varieties of alteration of capital is the surrender of shares. Though it is neither recognized by the Companies Act, nor mentioned in Table A ², it is quite frequently provided for in a companies' own articles of association, usually in the form of a special right of the directors to accept the surrender in order to avoid forfeiture ³. Though surrender has some similarity with the previous institution, i.e. the forfeiture of shares, it possesses a series of

1. Such a "strike" could easily enough hamper the interests of the creditors. Cf. Charlesworth, p.120 ; Gore-Browne, pp.535, 537 and 876.

2. This institution appears, however, in the Companies Clauses Acts governing the so-called statutory companies. Cf. Charlesworth, p.272 ; Wilton, Company Law and Practice, Edinburgh 1912, p.442 ; A.C.B(ennett), "Company Law, Surrender of shares", in : SLT, 1938, pp.213-214.

3. C.E.H.Chadwyck Healey, P.F.Wheeler and C.E.E.Jenkins, A treatise on the law and practice relating to Joint Stock Companies, 2nd ed., London 1886, pp.94 ff.; Charlesworth, p.121 ; Gore-Browne, p.534 ; Palmer, p.75 ; Wilton, pp. 72 and 82.

different features. The element of penal action is absent here. A repayment of the paid-up amount of the shares is not essential ¹, and an exchange for another type of shares is possible ². The assent of the shareholder is essential, and the normal way is for the offer of a surrender to come from him. Surrender is limited only to shares that are liable to forfeiture ³. Beyond that it should be considered merely as a type of an ordinary reduction, and therefore the sanction of the Court should be sought ⁴.

The third member of the group is disclaimer of shares ⁵. It very much resembles surrender of shares. It is the special case where the trustee of a bankrupt shareholder, or the liquidator of a company in a winding-up process (where the company is itself a shareholder of another company), disclaims shares which are subject to a liability. This proceeding, so far as it relates to individual shareholders, is regulated by the Bankruptcy Act, 1914, section 54 ; and in so far as it relates to company-shareholders it is regulated by the Companies Act, 1948, section 323 ⁶. It came into

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1. There may be a case where a surrender is arranged against a returning to the shareholder of the capital which he has paid-up, and the wiping out of the uncalled liability on the shares.
 2. In this particular case a surrender is nearer to reorganization of capital than to reduction. Cf.: "Company Law and Practice, New shares for old", in : "The Solicitors Journal", vol.90, London 1946, pp. 325 ff.
 3. Charlesworth, pp.121-122 ; O.Griffiths and E.M.Taylor, The principles of company law London 1949, p.133 ; Palmer, p. 75 ; and W.G.H.Cook, Company Case Law, London 1933, pp. 79-87. See also : Bellerby v. Rowland and Marwood's Steamship Company, 1902, 2 Ch. 14.
 4. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p.121 ; Green's Encyclopaedia of the Laws of Scotland, Supplement to vol.1-9, Edinburgh 1949, pp. 186-189 ; W.E.Levie, A Handbook of Company Law in Scotland, 1926, p.115.
 5. Gore-Browne, pp. 538 and 681-688.
 6. The Bankruptcy Act, 1914, and section 323 of the Companies Act of 1948 do not apply to Scotland.

existence for company-shareholders only in the Companies Act of 1929, and is still, from the point of view of company law, somewhat underdeveloped. It is certainly doubtful whether there is any good reason for grouping it with forfeiture and surrender ¹.

Owing to the stability of the currency system of this country, readjustment of capital ² as a type of alteration of capital is quite unknown in Scots and English Law.

A comparatively elaborate treatment is, however, given in the Companies Acts to different types of the last variety to be mentioned in this study - the reorganization of capital ³. Though the term "reorganization of capital" is not found in the Companies Act, except in S.206 (6) ⁴, it is used by some of the commentators ⁵. The material is

1. Gore-Browne, p. 534.

2. Cf. supra p. 60.

3. Cf. supra p. 61.

4. C.A.1908, S.45 (1), used the expression : "...to reorganize its share capital" to indicate a special type of consolidation-cum-division. Cf. W.E.Levie, op.cit., pp.101-102 ; J.Loudon, "Reorganization and Reconstruction of Limited Companies", in : "The Accountants' Magazine", vol.32, Edinburgh 1928, pp.231 ff.; A.M'Neil, Manual of the Law of Joint Stock Companies in Scotland, 2nd ed., Edinburgh 1926, pp.128-129 ; P.F.Simonson, Companies Acts 1900 and 1907, London 1908, pp.196-198 ; A.Stiebel, Company Law and Precedents, 2nd ed., vol.I, London 1920, pp.829 ff.; Wilton, pp.60-69.

This section was repealed later in 1928 on the recommendation of the Greene Committee on Company Law, and is partly incorporated now into the present S.206 of the Companies Act of 1948. Cf. Company Amendment Committee 1925-26, London (HMSO) 1926 (Cmd.2657), p.14 (32-33).

Cf. infra pp.122 ff., and Annex I, p. A 16 and footnote 2.

5. Cf. e.g. E.W.Chance and P.W.French, Principles of Mercantile Law, 12th ed., vol.II, St.Albans 1947, p.203 ; Gore-Browne, pp.540-545 ; Palmer, p.80.

split up into two parts : 1) the subdivision "Miscellaneous provisions as to share capital" ¹ is partly devoted to different types of reorganization of capital ², and 2) the subdivision "Arrangements and reconstructions" ³ concerns partly reorganization of capital in the sense of this study.

The order in which the different types of reorganization are placed in the text of S.61 of the Companies Act serves as an illustration of the gradual setting of these regulations into the context, - consolidation-cum-division and conversion into stock being the older types ⁴, and subdivision into smaller shares ⁵ and reconversion into shares ⁶ the more recent. It is astonishing to note from the point of view of system that even after the amendment to the present S.61 (1) ⁷ was introduced in 1900, and although types of alteration of the amount of shares ⁸ (either by issuing shares of a larger amount, or by issuing shares of smaller amount) were treated in Table A side by side ⁹, the regulations about conversion and reconversion ¹⁰ remained sandwiched between them.

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1. Cf. Annex I, infra pp. A 2-5.
 2. C.A.1948, S.61 (1)(b-d), and S.62 (1)(a-d). Besides, Art.40-43 and Art.45 of Table A deal mainly with these questions. The rather meagre commentaries on these questions indicate that they arouse little argument or interest.
 3. C.A.1948, Ss.206-209. Cf. Annex I, infra pp. A 14-16. Sections 208-209 are devoted to the questions of amalgamation which are beyond the framework of this study.
 4. C.A.1948, S.61 (1)(b), S.61 (1)(c)(first part), and S.62 (1)(a-b).
 5. C.A.1948, S.61 (1)(d), and S.62 (1)(d). This type was created in 1867.
 6. C.A.1948, S.61 (1)(c)(second part), and S.62 (1)(c). This type was created only in 1900. Cf. Annex I, infra p. A 3 and footnote 4, and p. A 4.
 7. Cf. Annex I, infra p.A 3, footnote 4.
 8. C.A.1948, S.61 (1)(b) and (d).
 9. Table A (1908), Art.44 (a-b); Table A(1929), Art.37 (a-b); Table A(1948), Art.45(a-b).
 10. C.A.1948, S.61 (1)(c).

Consolidation-cum-division indicates by its very terms the accomplishment of two actions, which usually but not necessarily can be done uno flatu, and may even be linked together in one single resolution¹. A consolidation takes place where e.g. eight shares of twelve shillings and sixpence each have been put together to form one share of five pounds². A post-consolidation division takes place when this consolidated share of five pounds is subdivided again into new shares, provided only that the final nominal amount of the new shares will be larger than their initial amount. It is doubtful whether a consolidation-without-division is valid³. One could easily enough admit its possibility if the words "and divide" were to be omitted from S.61(1)(b), and if the words "of smaller amount" in S.61(1)(d)⁴ were to be replaced by "of different amount", since then the first case would cover only the plain case of consolidation upward⁵,

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1. Gore-Browne, p.539 ; G.W.Wilton, Company Law and Practice in Scotland, 1912,p.88.
 2. The fact that C.A.1908,S.41(1)(b), which is identical with the present S.61(1)(b), spoke of "all or any of its share capital" (contrary to the text of Art.44 of the Table A of 1908) led G.W.Wilton (op.cit.,p.88) to the conclusion that there were two types of consolidation, one of them partial, the other covering the whole capital.
 3. Wilton (Alteration ..., p.53) admits this possibility, apparently interpreting the words "and divide" only in the sense that finally "the division must be into shares of larger amount than the existing shares". If so, the expression used by this author in the next paragraph on p.53,namely,"consolidation or division" is a little puzzling.
 4. While S.61 (1)(d) speaks about subdivision "into shares of smaller amount", S.62 (1)(d) speaks simply about subdivision of "its shares or any of them".
 5. This would, however, leave the case of a conversion-cum-reallocation aside. Simonson (pp.41 ff.) mentions such a case, where neither the amount of authorized capital, nor the nominal amount, nor even the amount of paid-up capital has been altered, but where only the uncalled area has been put anew at the discretion of the directors for replacing the extinguished liability of the shareholders with the power to place these newly created wholly unpaid shares on the market. Such a practice, unknown in the statute book, fits into the provision of S.206 rather than those of S.61.

but the second case would cover any subdivision, irrespective of whether it is done after or without a previous consolidation.

The next type of reorganization is the subdivision into shares of smaller amount ¹. This covers the case when e.g. a share of six pounds is subdivided into shares of one pound. The text of this section could lead one to the illogical conclusion that this does not cover the case of a consolidation-cum-division into shares of smaller amount than the original ones. Thus, it could seem that it would be impossible to subdivide uno flatu e.g. ten shares of six pounds each into twelve shares of five pounds each, since the previous amount cannot be divided into the latter one ².

Both these types are similar in this respect that the authorization by the articles ³ and an ordinary resolution of the company exercised in general meeting ⁴ are the necessary pre-conditions. The sanction of the court is not required ⁵. They differ, however, in the regulation that in subdividing the proportion between the paid-up and the unpaid areas has to be kept the same ⁶.

1. Wilton, pp.55-56.

2. Gore-Browne (p.540) and Wilton (p.55) indicate that the practice is to allow such a consolidation-cum-division into smaller shares to avoid fractional holdings.

3. This authorization is given by Art.45 of Table A (1948).

4. C.A.1948, S.61 (2) and Art.45 of Table A.

5. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p. 118 ; Palmer, p. 69.

6. This does not apply to the case of consolidation-cum-division into shares of larger amount. An unequal subdividing is possible and valid if the rules on reduction of capital (s.66) are observed, and a reduction or extinction of liability contemplated. Cf. supra p. 96.

Cf. Buckley on the Companies Acts, 12th ed., London 1949, p.149 ; W.F.Hamilton, A Manual of Company Law, 2nd ed., London 1901, p.56 ; and Gore-Browne, p.540.

The last case in this group is the conversion of shares into stock, and re-conversion of stock into shares, an institution confined to Anglo-American countries. In order to facilitate the flexibility and transferability of a "bundle" of shares, it is permissible to convert all or any of the paid-up shares into stock, and reconvert them later into shares¹. An original issue of stock without issuing of shares at all is not permissible though sometimes done in practice². An issue of stock either against not fully paid shares, or bonus stock, is illegal.

The provisions of the subdivision "Arrangements and Reconstruction"³ were primarily meant only for arrangements with creditors. Later they were extended to arrangements with shareholders⁴. Only the reform of 1928 and the definition of "arrangement" in the present S.206 (6) brought them into line with the reorganization questions dealt with in S.61⁵.

This section 206 of the Companies Act of 1948, as far as it concerns a reorganization of capital within the framework of this study, provides

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1. P.F.Simonson, The Companies Act 1900 with commentaries and forms, 2nd ed., London 1901, pp. 95-96 ; Wilton, pp.57-58.
 2. Gore-Browne, p.539, and the case quoted under note 121.
 3. C.A.1908, Ss. 120 ff.; C.A.1929, Ss. 153 ff.; C.A.1948, Ss. 206 ff.
 4. Wilton (pp.111 ff.) gives a survey of different meanings of "arrangement". Cf. also : P.F.Simonson, The Law relating to the Reconstruction and Amalgamation of Joint Stock Companies, 3rd ed., London 1919.
 5. There have been some talks and arguments about the connection between S.72 and S.206. One has, nonetheless, to remember that not always where S.206 is applicable is there sufficient ground to say that there is a "variation of rights" in the sense of S.72. Cf. "Company Law and Practice, Modification of rights", in : "The Solicitors' Journal", vol.91, London 1947, p.213.

that where an arrangement is proposed ¹ between a company and its shareholders ² the court may on the summary application ³ of the company or of any shareholder order a meeting of shareholders ⁴ or of a class of shareholders. If a majority representing three quarters of the shareholders or a class of them ⁵ agrees to the proposed arrangement and the court sanctions it ⁶, this arrangement is binding on all the shareholders and the company itself too.

In defining the word "arrangement", S.206 (6) provides that it includes "a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods". This definition has received a wide interpretation, though partly based on decisions given when S.45 (1)

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1. Contrary to the practice of the English courts, the Scottish court held in one case in 1910 that the application of a company for an order of the court directing the holding of meetings for consideration of a scheme prepared by its directors was prematurely presented because the scheme had not been submitted to the shareholders in general meeting. This point of view was overruled in another case in 1918, Cf. Wilton, p.116.
Since then it is considered that though a prior resolution of the company is not absolutely necessary, it is nonetheless very desirable, since its absence might well form a ground for the court to refuse to confirm the proposed arrangement.
Cf. Gore-Browne, p.789.
 2. The text of S.206 (1) and (2) uses the term "member" exclusively, in all probability to extend its applicability to companies limited by guarantee or unlimited companies which may exist without a share capital and whose members therefore could not technically be considered as shareholders. Cf. S.W.Magnus and M.Estrin, Companies Act 1948, 2nd ed., London 1951, p.31.
 3. S.W.Magnus and M.Estrin, op.cit., p.201.
 4. The court may order that no meeting be held where the remaining assets are ample to cover the claims of the shareholders affected. Cf. A.C.Bennett and R.A.Bennett, The Companies Act 1948, Edinburgh 1950, p.127 ; and William Dixon Ltd., 1948 S.C.515.
 5. Holders of the same class of shares with different amounts paid may be considered as belonging to different classes for the purpose of this section.
Cf. A.C.Bennett and R.A.Bennett, op.cit., p.127.
 6. Gore-Browne, pp.790-791.

of the Companies Act of 1908 was in force ¹. It is generally considered that if a part of such a reorganization of capital is a reduction, the sections applicable to reduction must come into operation ². S.206 (6) differs virtually from the previously mentioned Ss.61 (1)(b)(d) and 62 (1)(a)(d). The difference textually lies in the inclusion in the former of the words "of different classes", and the omission therefrom of the requirement of either larger or smaller shares ³. Between this S.206 (6) and the old S.45 (1908) ¹ the difference lies in the possibility of a consolidation-cum-division ⁴.

It is doubtful whether the provisions of S.206 (6) will prove to be a workable variety of reorganization of capital, since the extremely cumbersome procedure of S.206 (1) and (2) with the summary application to the court, the quorum requirements in a class meeting, and, finally, the sanctioning of the arrangement by the court, while acceptable in the relations between company and creditors, seem to be a burden too heavy to prove a success. The elasticity of the provisions of S.61 give a sufficiently wide scope of action. Even the risk of convening two consecutive meetings (in order to circumvent the requirements of S.61 of the subdivision into shares of either larger or smaller amount ⁵) would not, perhaps, seem too great if

1. Cf. Annex I, infra p.A 16, footnote 2.

2. A.C.Bennett and R.A.Bennett, *op.cit.*, p.128 ; Simonson, p.22.

3. Cf. supra p. 120, note 4.

4. C.A.1948, S.206 (6) : " ... or by both these methods".

Cf. also : W.B.Abbott, *Recent changes in company law and accounts*, Edinburgh 1929, p.26.

5. Cf. supra p. 121.

one has to compare it with the disadvantages of the procedure of section 206. On the other hand, if one would even accept the interpretation that any consolidation of shares of different classes brings the provisions of S.206 into operation, the applicability of S.72 on "variation of shareholders' rights" might in many cases offer the solution of a reorganization scheme of a still more elastic character than in the case of the cumbersome section 206.

2. F r a n c e .

French Company Law ¹ goes back to the Napoleonic Code de Commerce of 1807 ². It would seem therefore that one should attribute to it the laurel of seniority among modern company acts. However, the history of company law throughout the last 150 years shows that though the impact and influence of French Law in general was very considerable ³ it has had comparatively little impact upon the companies acts of other countries,

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1. Lit.: Ch.Lyon-Caen and L.Renault, Précis de droit commercial, two vol., Paris 1884 ; Ch.Lyon-Caen and L.Renault, Traité de droit commercial, 5th ed., eight vol., Paris 1921 ff.; A.Vavasseur, Traité des sociétés civiles et commerciales, 5th ed., Paris 1897 ; F.Arthuys, Traité des sociétés commerciales, two vol., Paris 1917 ; P.Pellerin, French Company Law, London 1920 ; R.Rousseau, Sociétés commerciales, two vol., Paris 1921 ; M.Copper-Royer, Traité théorique et pratique des sociétés anonymes, 3rd ed., five vol., Paris 1925 ff., 4th ed., Paris 1931 ff.; J.Streichenberger, Sociétés anonymes de France et d'Angleterre, Paris 1933 ; Ch.Houpin and H.Bosvieux, Traité general, théorique et pratique des sociétés civiles et commerciales, 7th ed., Paris 1935 ff.; P.Carry, "La nouvelle législation sur la société anonyme", in : "Bulletin de la Société de Législation Comparée", vol.67, Paris 1938, pp.177 ff.; P.Pic and J.Kreher, Des sociétés commerciales, 3rd ed., vol.I, Paris 1940, vol.II, Paris 1948; A.Moreau, La société anonyme, four vol., Paris 1946/1948 ; J.Escarra, E.Escarra and J.Rault, Traité théorique et pratique de droit commercial, Les sociétés commerciales, vol.I, Paris 1950, vol.II, Paris 1951 ; L.Batardon, Traité pratique des sociétés commerciales, 10th ed., Paris 1950.
 2. Among the older sources of French Company Law the articles of the F r e n c h Hudson Bay Company of the eighteenth century should, of course, be mentioned. Cf. Ch.Lyon-Caen and L.Renault, Précis de droit commercial, vol.I, Paris 1884, p.202.
 3. On the portability of the Napoleonic Codes and their dissemination throughout the world, see Toynbee, vol.VII, pp.268-277. On the general impact of French Law see: P.Arminjon, Baron B.Noide and M.Wolff, Traité de droit comparé, vol.I, Paris 1950, pp.136-216. On the impact of the Napoleonic Code Civil see also : A.de Saint-Joseph, Concordance entre les codes civils étrangers et le Code Napoleon, 2nd ed., four vol., Paris 1856.

except, perhaps, its nearest neighbours - Belgium and Luxembourg, and older Italian law. Its seniority was hardly an asset, and has in no way led to the foundation of a French group in company law. Just the contrary happened, since French company law, although influenced by foreign legislation at a later date still preserved in many ways a rather antiquated character. In two respects, however, its provisions were more consistent than the early company law of this country, namely the character of the company as a legal entity¹, and the absence of any personal liability on the part of the shareholders. On the other hand, the creation of companies was considered, to a much greater extent than in this country, to be a matter requiring the government's authority, and this theory remained the dominating idea for a much longer time than in Scots and English Law². Thus, in the first half of the nineteenth century France belonged completely to the group of states adhering to the system of "concessions"³. Only after the conclusion of a Franco-British convention of 30th April, 1862, was France forced to liberalize its attitude in these matters, and, acting partly under the impact of the United Kingdom Companies Act of 1862⁴, to modify the previous system of the Code de Commerce by a new law of 23rd May, 1863. Even then the French legislature did not altogether abandon

1. Ch.Lyon-Caen and L.Renault, vol.I (1884),p.245 ; Pic-Kreher, vol.I, p.194.

2. This idea was apparently the cause of the fiction theory in French jurisprudence. At least, it was so asserted. Only in the late thirties was a slight trend away from the fiction theory recorded, through more stress being laid on the personality conception of the company. Cf.Pic-Kreher, vol.I, pp.194-195 and pp.201-202.

3. Cf. supra p. 44.

4. C.A.1862, i.e. 25 and 26 Vict., cap.89.

state supervision of the larger companies, and only after another law of 24th July, 1867,¹ was this supervision almost completely abolished². On the other hand, this new law of 1867 departed somewhat from the liberal attitude adopted in 1863, and imposed a number of provisions and regulations upon the shareholders and creditors which embodied the principles of ius cogens to a much greater extent than would have seemed consistent with the liberal spirit of that time. This law of 1867 did not provide for the question of whether the extraordinary general meeting was empowered to amend the charter³. To a certain extent therefore the principle of unanimity for any amendment of the charter or any alteration of the capital was still applicable⁴. It was at the end of the nineteenth century that French jurists became aware of the fact that the main problem was whether

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1. Art. 47 of this law of 24th July, 1867, repealed the former law of 1863. Cf. A. Vavasseur, *Traité des sociétés civiles et commerciales*, vol. II, Paris 1897, p. 3.
This same law of 1867 provided for another, now almost obsolete, type of company, - the sociétés en commandite par actions (very often, and with a misleading effect, called simply -: sociétés par actions) which, as explained above (cf. supra p. 8) do not come within the framework of this study. Unfortunately enough, there also existed the rather confusing practice of calling both types together the "sociétés par actions". Cf. Pic-Kreher, vol. II, p. 21.
Literature on this French institution of company law was vast. Cf. e.g. A. Vavasseur, op. cit., vol. I, pp. 197-598 ; M. Caitucoli, *Les augmentations de capital dans les sociétés français par actions*, Toulouse 1923 ; J. Charpentier, *Etude juridique sur le bilan dans les sociétés par actions*, Paris 1906 ; G. Dardanne, *Les augmentations de capital des sociétés françaises par actions*, Poitiers 1924 ; A. Percerou, *Lois actuelles et projets récents en matières de sociétés par actions*, Paris 1932.
 2. Hamburger, p. 89 ; Ch. Lyon-Caen and L. Renault, vol. I (1884), p. 247.
 3. Ripert, p. 92.
 4. Pic-Kreher, vol. II, pp. 157-158.

the contrat sociale of a limited company is the fundamental or only a secondary element of the artificially created legal entity ; and that the solution of the question of whether the unanimity of all shareholders about any increase of capital is required depends on the standpoint accepted in the first problem ¹. From the point of view of the philosophy of law of that time it seemed simply inconceivable to speak about the fixation of a capital, though it might have ranged as a secondary element in the process of the creation of a limited company, as an unessential element ². Only the appearance of the institution of an "authorized capital" brought the feeling of the importance and essentiality of the numeral of the capital to a downfall. Only after 1903 could a slight relaxing of a rigid clinging to the principles of contractual relations as the dominant element of company law be observed ³. The general rule was that any augmentation of the shareholders' "engagement" was illegal without their consent ⁴. Only if the charter of a company provided for the procedure for altering the capital was it considered as conceivable that unanimity of all the shareholders would not be required.

The next steps in the development of French Company Law were the laws of 30th January, 1907, and of 22nd November, 1913, the laws of 1917 and 1926, the law of 1st May, 1930 ⁵, the laws of 1935 and 1937, the law of 14th Au-

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1. P.Appleton, Etude sur le droit des assemblees generales extraordinaires de modifier les statuts, Paris 1902, p.137.
 2. Ibid., p.138.
 3. Pic-Kreher, vol.II, p.157.
 4. L.Batardon, Traite pratique des societes commerciales, Paris 1950, p.356 ; Rauch, vol.I, p.59, note 2.
 5. B.Hepner, "Das französische Aktienrecht und seine Reformprobleme", in: "Zeitschrift für das gesamte Handelsrecht", vol.97 (1932), pp.279 ff.; vol.98 (1933), pp. 1 ff.

gust, 1941, the law of 4th March, 1943, the law of 23rd December, 1946, and the law of 4th August, 1949¹.

Only after 1930 was it permissible and within the authority of the general meeting to increase² or reduce the capital, to create priority shares, or to amend the relationship between the shareholders of different groups³. The authorization of the board of directors to effect an increase of capital, or, in a way, to continue the issue of capital "in instalments" is a part of the present system, though it would be wrong to assert that this was merely a variation on the Anglo-American theme of "authorized capital"⁴. Special regulations concerning quorum and majority can, of course, be provided. The state supervision of the investment market applies also to all increases of capital only if the amount of increase is over

1. Lit.: C. Denoyer, "Recent modifications of French Company Law", in : JCL, 3rd series, vol. XIX, London 1937, pp. 32 ff.; J. Escarra, "Some points of comparison between the Companies Act, 1948, and the French Law of Companies", in : "Cambridge Law Journal", vol. 11, London 1951, pp. 15-30 ; H. Kerwer, "Die abschliessende Neuregelung des französischen Aktienrechts", in : ZHR, vol. 105, Stuttgart 1936, pp. 60 ff.; V. Solus, La réforme du droit des sociétés par les décrets de 1935 et 1937, Paris 1938. Cf. also : Escarra-Rault, vol. I, p. 25 ; and Pic-Kreher, vol. I, p. 278.

2. Lit.: Ch. Corcelle, L'administration des sociétés, Les augmentations de capital dans les sociétés anonymes, Paris 1935 ; Janton, Etude financière et juridique sur l'augmentation dans les sociétés anonymes, Paris 1931 ; J. Landeroin, Les augmentations de capital dans les sociétés anonymes, Paris 1947 ; P. Maria, Des modifications du capital social, Paris 1913 ; J. Regis, Les augmentations de capital contre espèce des sociétés anonymes, Paris 1947 ; H. Viaux, Des augmentations de capital, Paris 1944 ; A. Wahl, Etude sur l'augmentation du capital dans les sociétés anonymes, Paris 1894.

3. Ripert, p. 92.

4. B. Hepner, op. cit., vol. 97 (1932), pp. 322 ff.; and vol. 98 (1933), pp. 5 ff.; Rauch, vol. I, p. 57 and note 3.

25 m.fr. (about L 25,000) . In all these cases a permit, or "concession", issued prior to the increase by the Ministry of Finance, is required ¹. Besides, all increases above the sum of 10 m.fr. have to be effected through the medium of special banks. If the increase is effected by mean of a successive formation ², a special procedure provided for in the law of 30th January, 1907, comes into operation. French jurisprudence is familiar in this connection with the question of a possible over-subscription of the suggested increase and the method of how "to spill the overflow"³. It may happen that the charter reserves to future agreement, or to a decision of the board of directors, the question of how to reduce the amounts subscribed down to the figure of the planned increase. If no other method is adopted, a proportional reduction of these amounts seems to be the logical solution ⁴.

The analogy between increase and formation has been followed by French jurisprudence since about 1867, but recently French jurists have started to reiterate that this point of view was faulty ⁵. Unlike Scots and English Law, a nominal minimum amount of a share was set up at 10,000 fr. ⁶, but

1. L.Batardon, *Traité pratique des sociétés commerciales*, Paris 1950, p.352.

2. Cf. supra p. 53 and note 3.

Though it is considered as unusual that a formation of a limited company should be dealt with in the form of a "successive formation" ("en faisant appel au public")⁷, it is a quite ordinary procedure in case of an increase of capital.

Cf. Escarra-Rault, vol.I, p.11 ; Pic-Kreher, vol.II, p.231.

3. Escarra-Rault, vol.II, p.116.

4. Escarra-Rault, vol.II, p.117 ; Pic-Kreher, vol.II, p.244.

5. Escarra-Rault, vol.II, p.11 ; B.Hepner, "Das französische Aktienrecht und seine Reformprobleme", in : ZHR, vol.98 (1933), p.7.

6. Art. 28 of the decret of 4th August, 1949.

On the previous minimal rates see : P.Pellerin, *French Company Law*, London 1920, p.25, note.

this provision did not apply to new shares issued after 1st September, 1949, provided that these new shares were assimilated either to all the older shares, or, in case of multiformity of shares, to one or more classes of them ¹. An increase by capitalization or dividing-up of the reserves of the company, eventually leading to the issue of bonus shares ², was considered as possible ³. The formalities concerning the subscription of new shares and the publications in connection with it were provided for in the law of 1907 ⁴. Contrary to Scots and English Law, and, to some extent, contrary to American Law too, French Company Law follows the principle of "souscription integrale" ⁵, i.e. declaring an incomplete subscription to be invalid ⁶. According to the law of 1943, at least one quarter of the increased amount should be paid at the time of subscription, and the remainder, in one or more instalments, within the period of five years after the increase comes into force. Contrary to the provisions concerning the formation of companies, an increase by compensation is admissible ⁷. Similarly, a qualified increase

1. L.Batardon, op.cit., p. 353.

2. L.Batardon, op.cit., pp.362 ff.; P.Joffroy, Des reserves et leur incorporation au capital social, Toulouse 1944 ; H.Lecomte and P.Bosvieux, De l'incorporation de la plus-value de re-evaluation au capital social, Paris 1947 ; Rauch, vol.I, pp.58-62.

3. B.Hepner, op.cit., in : ZHR, vol.98 (1933), p.12 ; P.Pellerin, op.cit., p.68 ; Rauch, vol.I, pp.58 ff.

4. Cf. also Art.59 of the law of 1867.

5. B.Hepner, op.cit., in : ZHR, vol.98, p.5 ; H.Kerwer, "Die abschliessende Neuregelung des französischen Aktienrechts", in : ZHR, vol.105 (1936), p.61 ; Pic-Kreher, vol.II, p.233.

6. The suggestion was made only quite recently that the de-facto amount subscribed in response to a proposed increase should be accepted as the final amount of the increase. However, it was still at first rejected by the court in the famous case of "le Gaulois". Cf. Pic-Kreher, vol.I, p.234.

7. L.Batardon, op.cit., p.353 ; Escarra-Rault, vol.I, p.12.

is possible ¹. The new shares ² can ^{be} either actions nominatives ("name-shares") or share warrants ³. On the other hand, an increase of capital by increase of the nominal amount of the shares is usually not allowed, and this is based on the principle that no augmentation of the engagements of the shareholders should be permitted ⁴.

According to the laws of 1943, an increase of capital is considered invalid if the previous capital has not been fully paid up ⁵. Pre-emptive rights were established only in 1935 ⁶. Even if contrary provisions are mentioned in the charter, these rights belong to the shareholders proportionally to the amounts they hold. This is rather an unusual provision. On the other hand, the general meeting is entitled ⁷, in certain specified circumstances, to abolish these rights ⁸, or to alter them. Unlike Scots and English law and the majority of the legal systems of the Continent, the observance of these rules regarding pre-emptive rights is comparatively rigid, since the penalty of the whole increase of capital being declared invalid may be inflicted if these rules are not observed ⁹.

1. A special "commissary" has to be appointed in this case. His obligation is to supervise a qualified increase. Cf. L. Batardon, *Traite pratique des sociétés commerciales*, Paris 1950, pp. 356 and 362.

2. Lit. on "share" in French Company Law : W. Boehm, *Über Aktionärschutz nach deutschem, englischen und französischem Recht*, Munich 1910; R. L. Lièvre, *La protection des actionnaires dans les sociétés anonymes, Etude de droit américain comparé au droit français*, Alleno 1939; J. Perron, *La création d'actions nouvelles lors d'une augmentation de capital*, Paris 1948; Schneider, *Die Aktie nach englischem, amerikanischem und französischem Recht*, Marburg 1930.

3. According to the law of 1903, the new shares can also be preference shares.

4. Cf. supra p. 129.

5. Escarra-Rault, vol. II, p. 260.

6. C. Denoyer, "Recent modifications of French Company Law", in : JCL, vol. 19 (1937), p. 37; Escarra-Rault, vol. I, p. 11, and vol. II, p. 260; B. Hepner, "Das französische Aktienrecht und seine Reformprobleme", in : ZHR, vol. 98 (1933), p. 8.

7. This resolution has to be passed in an extraordinary general meeting. Cf. L. Batardon, *op. cit.*, pp. 230-232.

8. L. Batardon, *op. cit.*, p. 355.

9. Escarra-Rault, vol. II, p. 260.

The resolution on increase usually has to be passed in two successive general meetings. The first of these has to be an extraordinary meeting¹. The purpose of the second one is mainly to verify the subscriptions, to declare the increase as completed, and to amend the charter accordingly. The value of the new share may be either on a par with that of existing shares, or different from it. The new shares can be issued at a premium².

Reduction of capital³ was provided for only in rudimentary form in the law of 1867, and it acquired the normal amount of detailed treatment (comparable with that in other systems of law) only after 1913. Contrary to the provisions on increase of capital, an extraordinary general meeting was not obligatory here. In principle, the resolution on reduction is considered as an amendment of the charter⁴, except where the charter provides otherwise. Reduction is within the authority of the general meeting⁵, but the question whether reduction is within the authority of the general meeting w h e n the charter is silent on this question

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1. The provisions of Art. 31 of the law of 1867 concerning quorum and majority are applicable to both general meetings summoned for this purpose.
 2. L.Batardon, op.cit., pp. 358 ff.
 3. Lit. : G.Cantenot, De la réduction du capital social dans les sociétés anonymes, Paris 1935 ; L.Cellerier, Etudes sur les sociétés anonymes en France et dans les pays voisins, Paris 1905 ; R.Cuënet, De la réduction du capital social dans les sociétés anonymes, Droits suisse, français et allemand, Montreux 1925, pp.69 ff and pp. 89 ff.; L.Genty, De la réduction du capital dans les sociétés anonymes, Paris 1908 ; P.Pic and J.Kreher, Sociétés commerciales, vol.I, Paris 1940, pp. 305 ff.; E.Sée, De la réduction du capital, Paris 1899 ; A.Spach, Etude de capital social dans les sociétés par actions, Nancy 1913.
 4. P.Appleton, Du droit pour les assemblées extraordinaires dans les sociétés par actions de modifier les statuts sociaux, Paris 1902.
 5. L.Batardon , op.cit., p. 381.

cannot be clearly answered in the affirmative ¹.

French jurists accounted for five different economic backgrounds to reduction. It may be due either to an over-capitalization of the enterprise ²; or to losses sustained by the company and leading to an "amortization" of a part of the capital ³; or to a depreciation of some of the assets; or to a verifying of initially over-valued assets; or, lastly, in connection with a proposed simultaneous or immediately following increase ⁴. In the first of these cases the problem of the maintenance of the interests of the creditors is a very important one ⁵. Any such reduction would become invalid if their interests were not kept intact. The creditors are entitled to oppose such a reduction, but this applies only to those who were creditors prior to the reduction ⁶. It sounds, however, a little antiquated when it is realized that this right of the creditors to "rely" on the previous amount of the capital continues for five years after the publication of the reduction.

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1. Some authors, like e.g. A.Wahl ("Commentaire de la loi du 22 novembre 1913"), consider the right of the general meeting to reduce the capital as existent even when the charter does not explicitly so provide. E.Lecouturier ("Manuel pratique des assemblées d'actionnaires") comes to an opposite conclusion, asserting that no general assembly has any right to alter the equality existing among the shareholders without the explicit consent of them all. He, apparently, bases this idea on the much-stressed principle of the contractual relationship between the shareholders.
 2. L.Batardon, *Traité pratique des sociétés commerciales*, Paris 1950, pp.383-401.
 3. Ibid., pp.336-351, and pp.401-406.
 4. Ibid., pp.406-411. It is really doubtful whether it would be possible to award the logicians' palm to this classification of the economic background into five groups.
 5. However, it is hardly necessary when the reduction is due to losses sustained by the company. There is no obligation even then to inform the creditors about the losses and the reduction. Cf. L.Batardon, *op.cit.*, pp.401 ff.
 6. L.Batardon, *op.cit.*, pp. 382-383.

Reduction by diminishing the nominal value of the shares is considered as admissible ¹. In practice this is applicable in those cases where the whole capital is not paid up. A most intricate situation may arise when the paid-up amount is not evenly spread over all the shareholdings ². Contrary to older principles, when the stress was still on the contractual side of the relationship between the shareholders, a link between a reduction of the capital and an alteration of the rights of the shareholders is now, and has been since 1913, quite conceivable ³.

Unlike Scots and English Law, French Company Law has ample scope to build up provisions concerning *r e a d j u s t m e n t* of capital ⁴. The lowering of the value of the French currency after 1914 has led many times to an alteration of the capital and of the nominal amount of the shares due to economic and financial events beyond the control of the companies themselves. These alterations were sometimes officially prescribed by the state authority, or their acceptance by the companies was made almost compulsory, but, contrary to what happened in Germany ⁵, there was until now always a parity, or, at least, a comparability of the old value with the new one. Instability of the currency caused the appearance of a novelty in

1. L.Batardon , op.cit., p.386 and pp.394 ff.

2. L.Batardon, op.cit.,pp.387-393, and p.411 ; Cuenet, p.58.

3. L.Batardon, op.cit., pp.412-413.

4. Cf. supra pp.60 and 118.

5. Cf. infra p. 184.

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4. Cf. supra pp.60 and 118.

5. Cf. infra p. 184.

accountancy : a special "rejuvenation fund" ¹ was invented in order to readjust the value of the different assets. This method, however, did not prove to be satisfactory, since the new accounts were usually quite illusory and deceptive. This was the reason why the transfer of this fund to the capital account in order to increase the capital by utilization of these reserves was considered as the best possible solution ². Thus, the sliding trend of the value of French currency had its parallel in a series of intermittent readjustments of the capital figures in the balance sheets of the companies. These increases were usually purely nominal and hardly indicated the true value of the capital assets.

1. F.: "fonds de renouvellement"

2. L.Batardon, *Traité pratique des sociétés commerciales*, Paris 1950, p.679.

3. Belgium.

The Napoleonic Codes form the background to Belgian Law ¹, but additional legislation, not only concerning company law, developed Belgian Law along somewhat different lines from those taken by French Law ². Nevertheless, the derivation from French Law is quite apparent even now in all structural and stylistic questions, though the rules of interpretation applied by the Belgian Court of Cassation are sometimes different from those applied by the French Court of Cassation. In spite of this similarity to French Company Law, and in spite of the acceptance of Roman Law principles on the structure of legal entities, Belgian Company Law ³ stresses more than French Law the contractual and the common law basis of a limited company, and mentions its balance sheet

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1. At the time of their promulgation the territory that is now Belgium was part of the Napoleonic Empire, and the Codes remained in force after the creation of the Kingdom of the Netherlands in 1815, and after the separation of Belgium in 1830. Cf. Arminjon-Nolde-Wolff, vol.I, p.137, and vol.II, p.187.
 2. Arminjon-Nolde-Wolff, vol.I, p.138 ; Hamburger, p.95.
 3. Lit.: M.Feye, *Traité de droit fiscal des sociétés et associations*, vol.I, Brussels 1934 ; Ch.Foucart, *Le droit des sociétés commerciales*, Thuilles (s.a., after 1947) ; L.Frédéricq, *Principes de droit commercial belge, Les sociétés commerciales*, two vol.; Ghent 1928/30 ; L. Frédéricq, *Traité de droit commercial belge*, vol.V, Ghent 1950 ; R.E.Kirkpatrick, *Practical treatise on Belgian Law*, London 1930 ; L.Passelecq, *Traité des sociétés commerciales*, Brussels 1934 ; C.Resteau, *Les sociétés anonymes devant les lois belges*, five vol., Brussels 1913-1914 ; P.Wauvermans, *Manuel pratique des sociétés anonymes*, 7th ed., Brussels 1937.
From a comparative point of view, see L.Bienaimé and P.Baudoin-Bugnet, *Le Code des sociétés anonymes en Europe*, Brussels 1938.

side by side with its charter as one of the basic elements of its constitution ¹. The next steps in the development of Belgian Company Law were the laws of the 18th May, 1873, ² and the laws of 1881, 1886, 1901, 1913, 1919 and 1926 ³, and the Arreté Royal of 30th November 1935 ⁴.

Questions about alteration of capital ⁵ are still dealt with on the basis of the analogy with the formation of the company ⁶. The same majority of three quarters in an extraordinary general meeting ⁷ is required here also ⁸. Though it is unusual, it is still possible for the charter to forbid alteration of the charter, and with it, alteration of the capital too. In that particular case, it is only by a unanimous decision of all the shareholders that the capital may be altered ⁹. The present provisions on

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1. F.Gilson, Les modifications aux statuts des sociétés anonymes, Brussels 1919, pp.77 and 81.
 2. The first project leading to this law was of 1865 (usually called "projet Pirmez").
 3. Hamburger, p.95 ; F.Norden, "Belgien", in : "Rechtsvergleichendes Handwörterbuch f. Zivil- und Handelsrecht", vol.I, part 1, Berlin 1927, p.11.
 4. Published in the official Moniteur of 5th December, 1935.
Belgian Law provides that law which was in force at the moment of the company's foundation is applicable to companies established prior to 1935. There are still a few companies left which were established prior to 1873.
Cf. F.Gilson, op.cit., p.2.
 5. Lit.: P.Coppens, L'abus de majorité dans les sociétés anonymes, Louvain 1947 ; F.Gilson, Les modifications aux statuts des sociétés anonymes, Brussels 1919.
Further special literature is mentioned in the bibliography of L.Frédéricq, vol.V, Ghent 1950.
 6. Ch.Foucart, op.cit., p.96; F.Gilson, op.cit., p.52 and pp.205 ff.; R.E.Kirkpatrick, op.cit., p.264.
 7. F.Gilson, op.cit., pp.202-203. This provision is quite analogous with that of French Company Law. There is not the possibility, even by provision in the charter, of delegating this function to the ordinary general meeting . Cf. also Gilson, p.39.
 8. In case of a multifirmity of shares, this majority has to be reached in each class of shares, but there may be cases where a unanimous decision in one of the particular classes is required. Cf. F.Gilson, op.cit., pp.204, 216, 235 ; Hamburger, p.95.
 9. F.Gilson, op.cit., pp.3 and 43.

increase of capital are generally the same as they were in 1913¹. An unusual pre-requisite for an increase is the provision that a minimum amount of seven members² should be on the roll of members at the time of increase³. The other provisions are less unusual, viz. a complete subscription⁴, and the paying-up, or an "effective" qualified increase⁵, of at least one fifth of the value⁶. Compared with Scots and English Law, Belgian Law keeps more strictly to all these requirements⁷. The charter may specify the amount of the rights attached to the new shares, and the phases of their introduction⁸. Unlike Scots, English and French Law, Belgian Company Law is familiar with the institution of "no-par-value"-shares⁹, and all the implications of an alteration of capital where shares

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1. L.Fredericq, *Traite de droit commercial belge*, vol.V, Ghent 1950, p.727 ; F.Gilson, *Les modifications aux statuts des sociétés anonymes*, Brussels 1919, pp.202 ff.
 2. F.: "associé". Unlike French Law and jurisprudence, Belgian legal terminology uses still more often "associé" than "actionnaire", though it is doubtful whether this points to some structural difference. Cf. F.Gilson, *op.cit.*, pp.234 ff.
 3. L.Frédéricq, *op.cit.*, vol.V, p.728 ; F.Gilson, *op.cit.*, p.52 ; R.E.Kirkpatrick, *op.cit.*, p.263.
 4. F.Gilson, *op.cit.*, pp.39 ff., and p.207.
Contrary to the latest development in French Company Law (cf. *supra* p.132, note 6), Belgian Law still adheres very closely to the old principle of "souscription integrale". Unlike the French practice, the occurrence of an increase by public subscription (i.e. similar to a "successive formation") is very seldom found in Belgium. Cf. F.Gilson, *op.cit.*, p.217 ; R.E.Kirkpatrick, *Practical treatise on Belgian Law*, London 1930, p.265.
 5. A curious provision of Belgian Company Law is the imposition, on those shares which represent a qualified increase, of a veto on or a restriction of their negotiability and transferability up to the tenth day after the publication of the second annual balance sheet following the increase. Cf. F.Gilson, *op.cit.*, p.210.
 6. F.Gilson, *op.cit.*, pp. 151, 206 and 208.
 7. R.E.Kirkpatrick, *op.cit.*, p.263.
 8. F.Gilson, *op.cit.*, p.223.
 9. Though considered as permissible since about 1873, it was recognized by statute law only in 1913. Cf. R.E.Kirkpatrick, *op.cit.*, p.266.

are issued without a par-value ¹. An issue of new shares above "par" is, however, considered as illegal. ²

Pre-emptive rights are usually provided for in the charters of Belgian limited companies ³. Their alienability is also provided for ⁴. On the one hand, the shareholders are not entitled to ask for the maintenance of the former amount of capital ⁵, but on the other hand, there is no question of any obligation on the shareholders to buy new shares, or to allow an increase of the amount of fully paid shares, in order to have not fully paid shares instead, at least not without the consent of all the shareholders ⁶. As in German Law, these pre-emptive rights appertain in the case of usufruct ⁷ to the "bare proprietor" ⁸.

Belgium was one of the first European countries where an increase out of surpluses and by incorporation of reserves was made possible ⁹. An unusual variety of such increase by capitalization is where creditors agree to a reorganization of the liabilities of the company by accepting shares in satisfaction of their claims. This is a qualified increase combined with an increase by capitalization of the debts and obligations of the company ¹⁰.

1. Cf. Board of Trade, Report of the Committee on Shares of no par value, London (HMSO) 1954 (Cmd.9112), p.4.

2. L.Frédéricq, op.cit., pp.728-729 ; F.Gilson, op.cit., p.212.

3. F.Gilson, op.cit., pp.215 ff.

4. L.Frédéricq, op.cit., pp.740 ff.

5. F.Gilson, op.cit., p. 79.

6. F.Gilson, op.cit., p. 204.

7. Cf. infra p.155.

8. F.: "nu propriétaire". Cf. L.Frédéricq, op.cit., p.741.

9. L.Frédéricq, op.cit., pp.743 ff.; F.Gilson, op.cit., pp.46 and 217 ; Rauch, vol.I, pp.62 ff., and vol.II, pp.107-110.

10. Such an action requires, however, the sanction of all the c r e d i t o r s. Cf. L.Frédéricq, op.cit., p.748 ; F.Gilson, op.cit., pp. 219 ff.

An increase by capitalization can be made either by issuing of new bonus shares, or by increasing the nominal amount of the shares without anything actually been paid on account of such an increase. There can be no question of such a capitalization being possible in the case of the so-called "reserves extraordinaires ou facultatives". According to some writers that applies also to the so-called legal reserves ¹. For a very considerable time, French and Belgian jurists devoted much space and energy to dealing with these very questions ², usually arguing that they are merely matters of accountancy ³. Some, however, asserted that a qualified majority was still needed in all these cases.

Belgian Law is also familiar with readjustment of capital ⁴ as a special type of alteration of capital in connection either with a re-valuation of the currency ⁵, or with an acquisition of alien territory ⁶.

Belgian Company Law provides for the following types of reduction of capital ⁷ : 1) the "formal" reduction, generally based on a readjustment of capital in order to rectify a negative balance sheet due to losses of the company ⁸, and 2) the "effective" reduction, generally based on the

1. L.Frédéricq, *Traité de droit commercial belge*, vol.V, Ghent 1950, p.743 ; F.Gilson, *Les modifications aux statuts des sociétés anonymes*, Brussels 1919, pp. 46-47.

2. P.Coart-Frèsart, *Revue pratique des sociétés*, Brussels 1927 ; L.Frédéricq, *op.cit.*, pp.745 ff.; E.and F.Genin, *Commentar op het wetboek der registratie-hypotheek-engriffie-rechten*, Brussels 1940, pp.495 ff.; Ch.Houpin, *Traité général, théorique et pratique des sociétés civiles et commerciales*, Paris 1895, 6th ed.(together with H.Bosvieux):Paris 1927, vol.II, pp.9 ff., 7th ed.: Paris 1935/37 ; Rauch, vol.I, pp.58-63.

3. Coart-Frèsart : "perequation" , L.Frédéricq : "simple jeu d'écritures"

4. Cf. supra p. 60.

5. L.Frédéricq, *op.cit.*, pp.747 ff.

6. E.g. the territory of Eupen-Malmedy after 1919. Cf. infra p.183, note 2.

7. L.Frédéricq, *op.cit.*, pp.749 ff.; F.Gilson, *op.cit.*, pp. 230 ff.

8. F.Gilson, *op.cit.*, pp.232 ff. Cf. infra pp. 203-204.

wish to bring an unemployment of capital to an end ¹, and usually linked with a repayment of fully paid shares, or an extinction of the liability concerning the not yet paid-up part, or with a repayment-cum-extinction. For all the types of reduction the principle of a prior satisfaction of the creditors is equally applicable, but the idea is still prevalent that a reduction of capital is only conceivable where there are no creditors ². This satisfaction can, however, be replaced in practice by a creditors' agreement. In one particular case, of course, it may happen that a reduction of capital will somehow be beyond the control of the creditors, viz. in the case of a reduction owing to the losses of the company ³. As in German Law, an induciae of six months ⁴ exists for all those cases where a repayment takes place. No dividend payments, or repayments to the shareholders are feasible within this time ⁵.

Again, Belgian Company Law is familiar with reduction-cum-increase, especially in the case of a reduction in the sense of a readjustment ⁶. Both decisions can be made in the same extraordinary general meeting. For all the types of reduction, an amendment of the charter is quite essential, and the extraordinary general meeting is the only place where that can be done. As is the case in German Law, only some minor functions concerning the implementing of such a decision can be delegated to the board. ⁷

A reduction of capital by diminution of the nominal amount of the

1. L.Frédéricq, op.cit., p.749.

2. L.Frédéricq, op.cit., p.750 ; F.Gilson, op.cit., pp.78-80, and p.236.

3. F.Gilson, op.cit., pp. 82 ff., and p.237.

4. Ibid., p.238. Cf. infra pp. 175 and 206.

5. Cf. infra p.158, and p. 175 and note 3.

6. F.Gilson, op.cit., p. 232.

7. Ibid., pp. 39 and 233.

shares is provided for in Belgian Company Law ¹. This may concern the not yet paid-up part of the shares, in which case one speak about a diminution or extinction of liability ². On the other hand, a reduction of capital may be effected by way of a reduction of the number of shares, either by exchanging new shares for old, or by the buying of shares by the company itself in order to cancel them.

1. F.Gilson, Les modifications aux statuts des societes anonymes, Brussels 1919, pp.244 ff.

2. Ibid., p.247.

4. L u x e m b o u r g .

The historical background of the Company Law of Luxembourg is very similar to that of France and Belgium ¹. This tiny monarchy has its own peculiar story of bilinguality. Though the Luxembourg vernacular has since 1839 been predominantly Germanic, and although it was from 1815 till 1918 economically linked with Germany, either through membership in the German Confederation (1815-1866), or, since 1842, through a customs' union, its legal language remained the French ² of the Napoleonic Codes ³. And though united in a personal union with the Crown of the Netherlands from 1815 till 1890, it always maintained French, and, especially, Belgian, legal and juridical traditions ⁴, partly, perhaps, as a result of the occupation of almost the whole territory by Belgium during the years 1830-1839 ⁵. The impact of the Belgian Companies Act of 1873 and the amendments thereto is evident in the Luxembourg Law on Commercial Associations of 1915 ⁶, which remains the sedes materiae concerning limited companies ⁷.

1. Arminjon-Wolde-Wolff, vol.I, pp.60 and 139.

2. It is worth while noting that French remained the legal language of a vast area of Western Germany up to 1900. Cf. Toynbee, vol.VII, pp.274-275.

3. A.Neyens, "Luxemburg", in: "Rechtsvergleichendes Handwörterbuch f. Zivil- und Handelsrecht" (ed. by F. Schlegelberger), vol.I, part 1, Berlin 1927, p.128.

4. Rauch, vol.I, p.63.

5. A.Neyens, op.cit., p.128.

6. Loi du 10 août 1915 sur le régime des sociétés commerciales. Quoted from : Textes législatifs concernant les sociétés de participation financières (Holding Companies), Luxembourg 1939, pp.38 ff.

7. Smaller modifications of the Luxembourg Company Law took place in 1922, 1927, 1930 and 1933. An earlier law of 23rd December, 1913, is still applicable in some special questions.

On the whole, the provisions concerning alteration of capital are the same as in Belgian Law. An unusual peculiarity is that the requirement of at least one-fifth being paid-up¹ is linked with another requirement, namely that the value of the paid-up part cannot be below 50 francs². This peculiarity means that if the nominal value of each share is below 250 fr., the requirement of at least one-fifth is replaced by that of a fixed sum of 50 francs. Three similarities with Belgian Law should in particular be noted : the number of members of the company has to be at least seven³ at the time of increase, "no-par-value" shares are admitted⁴, and it is illegal to increase the nominal amount of fully paid shares, in order to have not fully paid shares instead, unless the consent of all the shareholders is given⁵. The charter may, of course, provide otherwise. Compared with Belgian Law, there is slightly less rigidity concerning the "souscription integrale"⁶. An unusual provision concerning the voting system at the extraordinary general meeting is found in Luxembourg Law. The rule is that

1. Cf. supra p. 140.

2. Cf. Art. 26 and 31 of the Law of 10th August, 1915.

3. Cf. Art. 32 (1).

4. Cf. Art. 37 and 41 (2). Cf. also supra p.140.

5. Cf. Art. 67 (2). Cf. also supra p. 141.

6. More or less on the lines of the recent development in French Law (cf. supra p.140, note 4).

Cf. Art. 48 (3).

See also : Holding Companies under Luxembourg Law (published by : Banque Commerciale) Luxembourg 1930, p.14.

all limitations concerning the accumulation of votes ¹ become inoperative as soon as modifications or amendments of the charter or alteration of the capital are on the agenda, unless, of course, the charter itself provides otherwise ². An even more unusual provision concerns the rules on quorum and majority : any increase or reduction of capital requires a majority of two thirds ³ both in a "first" general meeting, where a quorum of at least half of the whole capital is required ⁴, and in a "second" general meeting also ⁵. But in this latter case the counting of votes has to be done in two ways : a simple majority of all shareholders present or represented ⁶ is first required, and then, simultaneously, a majority of two thirds, the absent or non-represented shareholders being considered this time as being present and as having voted with the strength of one third ⁷ in favour of

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1. The formula "each share gives one vote" is the classic example of a possible unlimited accumulation of votes in the hands of one wealthy shareholder. The formula "each share gives one vote, but no one can have more than ... votes" is, on the other hand, an example of limiting the amount of votes. This rule of Luxembourg Law means that all limitations of such a nature are automatically out of order as soon as an alteration of capital is on the agenda, since then all shareholders are voting with the maximum strength of their holdings. This provision of the Luxembourg Companies Act might have been drafted under some influence of American Law, since e.g. § 51 of the Stock Corporation Law of New York (1952) has a similar wording.
 2. Cf. Art. 67 (3).
 3. Cf. Art. 67 (8).
 4. Cf. Art. 67 (5) and 69.
 5. Cf. Art. 67 (5)(6)(8).
 6. Luxembourg Law is inconsistent in its use of the terms "member" and "shareholder". It uses sometimes "member" (e.g. Art. 32, part 1), and in many cases "shareholder" (e.g. Art. 48 and Art. 67, part 6). Cf. supra p. 140, note 2, and infra p. 212, note 3.
 7. F.: " ... mais au maximum pour un tiers de la totalite des voix". This ambiguous sentence could, of course, be interpreted as meaning that no more than one third of all votes cast either in favour or against the proposals of the board may come from these "presumptive voters". There is a slight mathematical inconsistency in this interpretation.

the proposals of the board ¹. In case of multiformity of shares, these rules on quorum and majority are equally applicable to all class meetings ². In case of reduction of capital, the proposed method has to be mentioned in the appropriate notice ³.

As in Belgian Law, Luxembourg Law provides for the possibility of an increase of capital out of surpluses, by capitalization of the reserves, and by augmentation of the nominal value of the invecta et illata of the company in case of a prior qualified formation or a qualified increase ⁴. This provision became a financial "best-seller" in connection with a decision of the Belgian Court of Cassation at the end of 1931 ⁵, to the effect that the proportional tax was not applicable to all kinds of "internal" increases ⁶. The Luxembourg tax offices started to apply this principle in the Grand Duchy too and charged only a droit fixe ⁷. It was in connection with this decision, and the promulgation of a special law regarding holding companies ⁸ that Luxembourg Company Law came into the limelight. These holding companies differed from the usual limited companies only in one point, namely, concerning the object of their trade. While the usual limited

1. Cf. Art. 67 (6)(8).

2. Cf. Art. 68.

3. Cf. Art. 69 (2).

4. This possibility was provided for for the first time in the above-mentioned law of 1913 .

5. Rauch, vol.I, p.64.

6. This expression is of Italian origin (It.: "aumenti interni"). Cf. infra p. 210.

7. B.Delvaux and E.Reiffers, Les sociétés Holding au Grand Duché de Luxembourg, 4th ed Paris 1953, pp.220 ff.

8. Loi du 31 juillet 1929 sur le régime fiscal des sociétés de participation (Holding companies). Quoted from : Textes législatifs concernant les sociétés de participation financières (Holding Companies), Luxembourg 1939, pp. 3 ff.

company is concerned either in commerce or in industry, the "pure" type of holding company deals exclusively with aggregation of capital ¹ or "emboitement", and a mixed type of holding company deals partly with aggregation of capital, and partly with commerce and/or industry. From the point of view of structure, holding companies are usually limited companies but they could also be formed as something else, e.g. as a partnership.

It was the deliberate financial policy of a number of smaller states to attract the domiciliation of alien companies by promising special favours in the taxation of capital. Besides Luxembourg ², some of the Swiss cantons (especially Glaris and Grisons), Liechtenstein ³, Tangier ⁴, Curaçao, Panama ⁵, some of the American states (especially Delaware ⁶ and New Jersey), and, up till 1945, Monaco also, have all become famous as countries which had introduced special "liberal" legislation" favouring the formation of holding companies and thus concentrating foreign capital in their countries ⁷. The relative easiness of increasing capital out of reserves and by re-valuation of reserves by the issue of bonus shares or otherwise is, of course, one of the main elements which facilitates the formation of

1. Textes législatifs concernant des sociétés de participation ..., 1939, p.5.

2. Cf. the English pamphlet : "Holding Companies under Luxembourg Law", published by the Banque Commerciale of Luxembourg in 1930.

3. Cf. infra pp. 245 ff.

4. Under the auspices of the Compagnie Belge de Banque et de Gestion at Tangier.

5. Under the auspices of the International Corporation Company, Inc., New York.

6. R.C.Larcom, The Delaware Corporation, Baltimore 1937.

Cf. infra p.219 and note 4.

7. B.Delvaux and E.Reiffers, op.cit., pp.295-302 ; P.R.Rosset, Les Holding Companies et leur imposition en droit comparé, Paris 1931.

nominal skeleton companies which can expand later and be adapted as holding companies ¹.

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1. Textes législatifs concernant les sociétés de participation financières (Holding companies), Luxembourg 1939, p.5.
B.Delvaux and E.Reiffers, Les sociétés Holding au Grand-Duché de Luxembourg, 4th ed., Paris 1953, pp.116 and 222.

5. Germany .

The historical background of German Company Law has much in common with English Law, especially during the time when there were as yet no Companies Acts, and comparisons were possible "on the charter level" ¹. As in England and Italy, German Company Law was in many respects at first, in the later Middle Ages and thereafter, derived from the charters of corporate bodies of the merchant marine ², and it was only much later that the amount of privilege ("octroi") started to overshadow the formation and the management of this type of corporation.

The first statute laws of various German states were partly influenced by the French Code de Commerce ³. Further statutory development of Company Law in Germany was as follows: the older Code of 1861 (the so-called ADHGB)⁴.

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1. K.Cosack, Lehrbuch des Handelsrechts, 6th ed., Stuttgart 1903, p.557.
 2. Cf. R.Fischer, "Die Aktiengesellschaft", in : "Handbuch des gesamten Handelsrechts" (ed.by V.Ehrenberg), vol.III, part 1, p.13 ; M.Gutzwiller, "Rechtsvergleichung in kontinentaler Sicht", in : "R  cueil de travaux suisses pr  sent  s au IV-i  me Congres International du Droit Compar  ", Geneva 1954, p.5 ; P.Rehme, "Geschichte des Handelsrechts", in : "Handbuch des gesamten Handelsrechts" (ed.by V.Ehrenberg) ,vol.I, Leipzig 1913, pp.219 ff.
 3. E.g. the Prussian Law on Railway Companies of 1838, the draft of a Commercial Code of Wurttemberg of 1839, the draft of a Commercial Code of Nassau of 1842, the Companies Act of Prussia of 1843. For the history of German Company Law see : H.Schumacher Die Entwicklung der inneren Organisation der Aktiengesellschaft im deutschen Recht bis zum ADHGB, Stuttgart 1937.
 4. This Code remained in force in Austria up to 1938. Among various annotated translations of this Code (including all the Acts issued after 1861) these French editions may be mentioned : one, published in 1881 by P.Gide, Ch.Lyon-Caen and J.Dietz, and another, published in 1896, by P.Carpentier.

an Act of 1870 (usually quoted as "Aktiennovelle"), an Act of 1884¹, and the new Commercial Code of 1897 (the so-called HGB)². Though German Company Law recognized limited companies as legal entities³, they were still in 1897 considered in many respects as a kind of informal association⁴.

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1. This Act of 1884, which remained almost unchanged in its general outline through the recodification of the HGB up to 1937, was mainly based upon the idea of a "normative" system mildly supervised by the registrar. Cf. R. Rosendorff, "The new German Company Law and the English Companies Act, 1929", in : JCL, 3rd series, vol. 14, London 1932, p. 94.

This Act of 1884 introduced pre-emptive rights into German Company Law. Cf. A. Dueringer and M. Hachenburg, *Das Handelsgesetzbuch*, 3rd ed., vol. III, part 1, Mannheim 1934, pp. 5 ff.; Rauch, vol. II, p. 73, note 1.

2. This HGB, which came into force on 1st January, 1900, remained the main source of Company Law up to 1937. Other parts of this Code are still valid. An English translation of this HGB appeared under the editorship of W. Bowstead in the British edition of the work "The Commercial Laws of the World", London (Sweet and Maxwell) (s.a.), vol. 24, part 1. Among various other translations there should be mentioned a translation by B. A. Platt, *The Commercial Code for the German Empire*, London 1900, and that by A. F. Schuster, *The German Commercial Code (HGB)*, with an introduction by E. J. Schuster, London 1911. There are, besides, excellent French translations of this HGB. One of them appeared in 1901 under the title : *Legislation commerciale de l'Allemagne, Code de Commerce mis en vigueur en 1900*, Paris (A. Chevalier-Marcocq) 1901, and another was done by P. Viatte, *Code de Commerce Allemand*, Paris 1901.
3. Thöl, Dernburg and Meurer were supposed to be the only exceptions among German authors who were opposed to this idea. Cf. K. Cosack, op. cit., p. 556, note 1 ; C. Ritter and J. Ritter, *Aktiengesetz*, Berlin 1939, p. 3 (2a) ; W. Schmidt-Rimpler's critical notes on the books by H. Schumacher and K. Bösselmann, in : "Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Germanistische Abteilung", vol. 62, Weimar 1942, pp. 549 ff.
4. G. : "Verein". The expression "Aktienverein" still occurred now and then in the years prior to 1900, but gave way to the more precise "Aktiengesellschaft". Still, HGB § 6 (2) qualified companies limited by shares as "Verein". Cf. A. Renaud, *Das Recht der Aktiengesellschaften*, Leipzig 1863, p. 459 ; K. Cosack, op. cit., p. 619 and *passim* ; Ritter, p. 3.
There is some similarity in the rather archaic forms of the terms "articles of association" and "memorandum of association" in Scots and English Law, which are also merely reminiscences of pre-corporative influences in modern company law.

The regulations of the HGB concerning alteration of capital were as follows. An increase of capital was considered possible only when the former capital was fully, or almost fully, paid-up¹. Though the HGB did not provide for any type of increase other than increase by issue of new shares² an increase of capital by increasing the nominal value of the previously issued shares was recognized in theory and met with in practice³. Pre-emptive rights⁴ were also recognized. Provisions concerning them were rather elaborate⁵, and the juridical literature devoted to these questions was extensive⁶. Pre-emptive rights became inoperative, however, in the case where the increase of capital was effected by increasing the nominal

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1. HGB § 278 (1). Cf. K.Cosack, Lehrbuch des Handelsrechts, Stuttgart 1903, p.619 ; Staub, pp.481 ff.; Ritter, p.481.
 2. G.: " ...durch Ausgabe neuer Aktien" was rendered by B.A.Platt, op.cit.,p.112, as "by issuing new shares", but by Bowstead and Schuster in their translations as "fresh shares", or "fresh issue of shares".
 3. Staub, p. 479 (1c).
 4. HGB § 282 did not know a special terminus technicus for pre-emptive rights. Neither was there any special word coined in the German juridical literature of the nineteenth century. Though the text of § 282 spoke about "the right to ask that he be allotted an amount of new shares" (B.A.Platt, op.cit., pp.114-115), which is a perfect rendering of the German phrase : " ... neuen Aktien zugeteilt werden ..", the juridical literature coined and adopted the term for it : "Aktienbezugsrecht", i.e. the right to demand allocation of shares. Bowstead, op.cit., p.153, translated it in one of the footnotes as " .. the right of the shareholders to claim preferential allotment", or, simply : " preferential treatment".
 5. HGB §§ 282 ff.
 6. Lit.: Gùldenstern, Das Aktienbezugsrecht, Munich 1914 ; Karo, Die rechtliche Natur des Aktienbezugsrechts und seine Gestaltung bei Bestehen eines Pfandrechts, Erlangen 1916 ; H.Herold, "Die Ausübung des Aktienbezugsrechts bei einer Verpfändung und Sicherungsübereignung der Aktien", in : "Gruchots Beiträge zur Erläuterung des deutschen Rechts", vol.65, Berlin 1921, pp.385 ff.; Stern, Der Grundsatz der gleichmässigen Behandlung der Gesellschafter und der Ausschluss des Bezugsrechts, Soest 1925.

value of the shares ¹. The revocability of these rights in advance by the charter was not permissible ². Similarly, it was considered invalid to promise pre-emptive rights in the charter prior to the resolution on increase of capital ³. However, it was considered possible to cancel or alter them through a resolution in general meeting when dealing with the proposed increase. By way of such an alteration of pre-emptive rights, provided it was possible according to the Companies Act and the charter, pre-emptive rights could be created with different "strengths" for different groups of shareholders, and, in certain circumstances, for non-shareholders also ⁴. A waiving or limiting of these pre-emptive rights occurred very often in connection with a qualified increase ⁵.

As with Scots and English Law, German Company Law puts less stress on the rights of the shareholder to a certain amount of new shares, than on the obligation of the corporation to allocate a certain amount of new shares to a shareholder if asked by him ⁶. Though these rights are attached to the "shareholders" and the expression "member" does not occur in the sections in question ⁷, they are still considered by German jurists as forming part

1. Staub, pp. 479 and 493.

2. K.Cosack, op.cit., pp.619-620 ; R.Mueller-Erzbach, Das private Recht der Mitgliedschaft als Prüfstein eines kausalen Rechtsdenkens, Weimar 1948, p.91 ; Staub,p.494.

3. This was the result of the reform of 1884. Cf. R.Fischer, "Die Aktiengesellschaft", in : " Handbuch des gesamten Handelsrechts" (ed.by V.Ehrenberg), vol.III, part 1, Leipzig 1916, p.323.

4. Cf. supra p. 56, note 3.

5. Staub, p.494.

6. Cf. supra p. 78, note 4.

See also HGB § 282 (1), and Ritter, p.489.

7. Staub, p. 497 ; Ritter, p.489.

of the rights that are attached to "membership" ¹. It is, however, doubtful whether we can recognize as valid their point of view concerning the automatic transfer of these pre-emptive rights to non-shareholders in the cases of usufruct ², or cessio legitimacionis of the shares ³, since, strictly speaking, no person other than a shareholder should be considered as entitled to claim an allocation ⁴ of the new shares, unless specially mentioned in the resolution. Such a resolution had to mention the proportion of the "pre-emption" ⁵ and the period of grace ⁶ within which these claims on allocation had to be made by the shareholder. The HGB mentioned a minimum of two weeks ⁷.

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1. G.: "Recht aus dem Mitgliedschaftsverhältnis". Cf. K. Geiler, "Die wirtschaftliche Methode im Gesellschaftsrecht", in : G , vol. 68, Berlin 1927, p. 612 ; H. Herold, "Die Ausübung des Aktienbezugsrechts bei einer Verpfändung und Sicherungsübereignung der Aktien", in : G , vol. 65, pp. 386 and 388 ; Ritter, p. 489. R. Mueller-Erzbach (op.cit., p. 318) expressed the view in his rather philosophical study on this subject that the gradual lessening of the amount of obligations on the part of the shareholders derived from their status as members of the company - leads to a depersonification or withering away of the membership itself. The incapacity of the company to impose new "membership"-obligations upon its shareholders is, in his opinion, indicative of this process also. According to R. Mueller-Erzbach (op.cit., p. 319), all the privileges attached to different classes or groups of shares, including pre-emptive rights, are nothing else than the last remainder of the rights of the company to "rely" on its shareholders as its members. One should come to the conclusion (though R. Mueller-Erzbach has not said so explicitly !) that a waning of these pre-emptive rights (as observed in Scots and English Law, but not yet in the Law of Northern Ireland ; cf. supra p. 57 and pp. 77-79) goes hand-in-hand with a growing rift between " m e m b e r s h i p ", as the natural relationship between co-partners of a social body, and " s h a r e h o l d e r s h i p ", as the formalized and rather anaemic residuum of the relationship between co-partners of a super-personified body of a p u b l i c company.
 2. G.: "Niessbrauch". Cf. Ritter, p. 489; Staub, pp. 497 ff.
 3. G.: "Legitimationszessionar".
 4. G.: "Zuteilungsanspruch".
 5. Cf. supra p. 78, note 3.
 6. W. Bowstead, Commercial Laws of the World, vol. 24, part 1, p. 153.
 7. HGB § 282 (2).

An increase of capital was looked upon as an alteration of the charter ¹. Accordingly, a majority representing at least three quarters of the capital, present ² at the time of voting, was required, unless the charter provided otherwise ³. However, a simple majority was sufficient to reject a motion for increase ⁴. Provisions regarding company formation were usually applied per analogiam ⁵, especially concerning the modus of subscription ⁶ of the new shares ⁷, the amount to be paid-up, and the time within which that should be done. An issue of new shares "below par" ⁸ was not allowed ⁹.

Reduction of capital was provided for in four rather short sections ¹⁰. There were two main types envisaged, namely, reduction with a partial

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1. Older ("ADHGB") German literature : H.Keyssner, Die Aktiengesellschaft und die Commandit gesellschaft auf Aktien, Berlin 1873 ; Nissen, "Die Erhöhung des Grundkapitals einer Aktiengesellschaft", in : ZHR, vol.19, Erlangen 1873, pp.353 ff. The "HGB" German literature is summarized by R.Fischer, "Die Aktiengesellschaft", in : "Handbuch des gesamten Handelsrechts" (ed.by V.Ehrenberg), vol.III, part 1, Leipzig 1916, pp.319 ff.
 2. A.Dueringer and M.Hachenburg, Das Handelsgesetzbuch, 3rd ed., vol.III, part 1,p.503.
 3. HGB § 275 (1).
 4. Staub, p. 471.
 5. K.Cosack, Lehrbuch des Handelsrechts, Stuttgart 1903, p.620 ; Rauch, vol.I, pp.106-116.
 6. The German term "Zeichnungsschein" was rendered as "subscription certificates" by W.Bowstead, op.cit., p.153, or as "subscription tickets" (B.A.Platt, The Commercial Code for the German Empire, p.114), or simply -"application" (A.F.Schuster, The German Commercial Code ..., London 1911, p.131).
 7. HGB § 281.
 8. The term "below par" was not yet used by the translators of the HGB.Cf.B.A.Platt, op.cit., p.65; A.F.Schuster, op.cit., p.74 ; W.Bowstead. op.cit., p.125.
 9. HGB § 184. Lit.: K.Cosack, op.cit.,pp.621 and 624 ; A.Dueringer and M.Hachenburg, op.cit.,p.307 ; Heinrich, "Zur Frage der Kapitalbeschaffung bei Aktiengesellschaften", in : G , vol.67, Berlin 1925, pp.353 ff.; Staub, p.46.
 10. HGB §§ 288-291. Lit.: R.Fischer, op.cit., pp.328 ff.; Neuburger, Die Herabsetzung des Grundkapitals bei Aktiengesellschaften, Berlin 1911 ; E.See, Die Herabsetzung des Grundkapitals nach deutschem und französischem Recht, Heidelberg 1906.

repayment of the capital to the shareholders ¹, and reduction without such repayment, the latter being often called the accountant's reduction ². A majority representing at least three quarters of the capital was required, and the charter could provide additional requirements ³ for quorum and majority. In case of a multiformity of shares, sectional voting of the different groups was provided for.

The resolution had to contain the reason for and the mode of reduction ⁴. Both ways were feasible, i.e. a reduction of the nominal amount of shares, or the reduction of the number of shares ⁵. Reduction by consolidation ⁶, and by redemption ⁷ of shares were also within the scope of German company law. Gradual reduction ⁸ was allowed, differing from the usual type of reduction in the framing of the resolution, namely, whether there was to

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1. HGB § 288 : " ... zur teilweisen Rückzahlung des Grundkapitals an die Aktionäre".
 2. G.: "rechnungsmässige Kapitalherabsetzung". Cf. also : B.Mosimann, Die Kapitalherabsetzung des Grundkapitals bei der Aktiengesellschaft und ihr Einfluss auf die wohlerworbenen Rechte des Aktionärs, Zurich 1938, p.21.
 3. HGB § 288 : " ... andere Erfordernisse" was translated as "other requirements" by W.Bowstead (Commercial Laws of the World, vol.24, part 1, p.153), or as "more stringent conditions" (A.F.Schuster, op.cit., p.134), or as "further provisions" (B.A.Platt, op.cit., p.117).
 4. HGB § 288 (2). Cf. K.Cosack, op.cit., p.624.
 5. Staub, p.510.
 6. A.Canto, Die Herabsetzung des Grundkapitals der Aktiengesellschaft mittels Zusammenlegung von Aktien und die Rechte des Einzelaktionärs, Cologne (s.a.), pp.6 ff. and p.24 ; Cuenet, p.76.
 7. G.: "Einziehung von Aktien, Amortisation". I am very much indebted to the terminological index appended to the publication by the Foreign Office : "Manual of German Law", vol.I, London (HMSO) 1950, pp.277 ff., but at the same time it cannot be said that the index is complete.
 8. Staub, p. 514.

be a reduction by a certain amount, or down to a certain amount. In the latter case, the company was authorized gradually to reduce the capital down to the amount specified in the resolution. The following provisions contrary to Scots and English Law should be noted : - German statute law provided for a minimum below which no reduction was allowed ¹ ; there was a special requirement, that the projected reduction had to be contained in the agenda of the general meeting ² ; and it was provided that only after an induciae of one year ³ were repayments to shareholders, or payment of dividends from the reduced capital to be allowed ⁴ . Such then in brief, were the provisions of the HGB.

The new German Companies Act of 1937 ⁵ , though at that time obediently hailed as a result of Nationalsocialism and Third Reich wisdom ⁶ , was mainly

1. Kuhn, p.69.

2. HGB § 274 (2). Staub, pp.468 and 513.

3. This induciae was called in German "Sperrjahr". HGB § 289 (4) : " ... ein Jahr verstrichen ist .." was rendered as "until after a year has passed" (W.Bowstead, op.cit., p.154), or as "after the expiration of a year" (B.A.Platt, The Commercial Code for The German Empire, p.118).

4. HGB § 289 (4). Cf. K.Cosack, Lehrbuch des Handelsrechts, Stuttgart 1903, p.625 ; Staub, p. 518.

5. G.: "Aktiengesetz 1937", usually abbreviated as AG. A French translation of the German Companies Act of 1937 ("AG") can be found in the works by P.Boudoin-Bugnet, Les sociétés par actions en Allemagne, Paris 1939, and by M.Doucet, Code de commerce allemand et autrichien, Paris 1949, pp.195-281. This German Companies Act of 1937 was commented on by M.Wolff, "Commercial Law", in : "Manual of German Law" (ed.by Foreign Office), London (HMSO) 1950, and in English periodicals, i.a.by : F.A.Mann, The new German Company Law and its background", in : JCL, vol.19, part 4, London 1937, pp.220-238, and H.G.Tasse, "The new German Company Law", in : "The Bell Yard", vol.20, London 1937, pp.19 ff. Good French comments on this law were given by E.Mezger, Le nouveau régime des sociétés anonymes en Allemagne, Paris 1939.

6. Ritter, p. 2 ; F.A.Mann, op.cit., p.227.

the result of many unsatisfactory partial reforms ¹ of the HGB regulations regarding public companies ², but the Companies Act of 1937 ("AG") was in many respects outdated even before it came into force. An innovation was the splitting up of the sixth chapter ³ into three subdivisions ⁴ with respective headings, where "increase of capital" was dealt with in the first "subparagraph" ⁵ of the second subdivision, i.e. the one devoted to "Supply of Capital" ⁶. Textually this "subparagraph" covers ten sections which are in their contents much more elaborate than those corresponding to them in the HGB.

The new AG § 149 corresponds more or less to the previous HGB § 278. An increase of capital is still considered as a form of alteration or amendment of the charter ⁷, and all the general rules on alteration of

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1. The best known statute containing a partial reform of the company law of the HGB was that of the 16th September, 1931. This "Notverordnung" was usually referred to as "Aktienrechtsnovelle". It received commentary by W.Schmidt and H.and A.Pinner in : Staub's Kommentar zum Handelsgesetzbuch, Nachtrag zur 12.und 13.Auflage, Berlin 1932 ; and in English periodicals by R.Rosendorff, "The new German Company Law and the English Companies Act", in : JCL, vol.14, London 1932, pp. 94 ff., and vol.15, London 1933, pp.112-116, and pp.242-254. This author stressed the impact of Anglo-American Law on some of the institutions of company law.
 2. The counterpart of the British private companies (cf. supra p.8), the so-called Gesellschaft mit beschränkter Haftung, or,abbreviatedly, G.m.b.H., were never provided for by the same statutory act. Cf. F.A.Mann, op.cit., p.228.
 3. "Alteration of the charter, Supply of capital, Reduction of capital".
 4. G.: "Abschnitt",
 5. G.: "Unterabschnitt".
 6. G.: "Kapitalbeschaffung". Lit.: Heinrici, "Zur Frage der Kapitalbeschaffung bei Aktiengesellschaften", in : G , vol.67, Berlin 1925, pp.353 ff.; Quassowski, "Formen der Kapitalbeschaffung", in : "Festgabe für Schlegelberger", Berlin 1936, pp.377 ff.; A.Wieland, "Kritisches zum Kapitel der Grundkapitalveränderungen nach dem neuen Aktienrecht", in : "Zeitschrift für schweizerisches Recht", vol.57, Basle 1938, pp.3 ff.
 7. G.: "Satzungsänderungen".

the charter ¹ apply here too, unless special rules on increase ² and corresponding rules in the charter provide for something different ³. Any alteration of the charter is invalid if it is contrary to the provisions of charter at the time of alteration ⁴, e.g. no item of the charter defined as being unalterable can be altered, even where there is a unanimous decision in favour of doing so.

This section only mentions the increase of capital by issue of new shares ⁵, although it has been held in theory that here, and elsewhere, "new shares" means "new portions of membership" ⁶ and not necessarily only "new share documents" ⁷, and that an increase of capital by increasing the amount of the shares is admissible. AG § 149 (1) recapitulates the general rule of AG § 146 about the requirement of a three-quarters majority ⁸. As

1. AG §§ 145-148.

There is no legal quorum requirement in the German Companies Act of 1937 ("AG"), but special regulations are often to be found in the individual charters of companies. There is, besides, a decree requiring a quorum of one-third of the capital. This decree was introduced in the British Zone of Western Germany on 17th December, 1946. Cf. R.v. Godin and H. Wilhelmi, *Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien*, Berlin 1937, p. 494; and Teichmann-Koehler, p. 228, and pp. 366 ff.

2. AG §§ 149-158.

3. The shareholders do not possess an inalienable right to demand the maintenance of the same amount of capital that existed when they became shareholders. Cf. Teichmann-Koehler, p. 374.

4. Teichmann-Koehler, p. 366 (1).

5. G. : " ... durch Ausgabe neuer Aktien". Cf. R.v. Godin and H. Wilhelmi, *op.cit.*, pp. 495 ff.; Rauch, vol. I, p. 16.

6. G. : " Mitgliedschaft".

7. Ritter, p. 479; Teichmann-Koehler, pp. 373 ff.

8. R.v. Godin and H. Wilhelmi, *op.cit.*, p. 496; Teichmann-Koehler, pp. 368 ff.

mentioned above ¹, a special quorum is not required. This can, of course, be altered by the charter ², and additional requirements can be included in the charter, as e.g. about a special quorum. Class meetings and adequate notice in the agenda are provided for in the case of a multiformity of shares ³. A below-par-issue of new shares is still prohibited, but, in the case of an above-par-issue, the minimum price of the shares has to be stated in the resolution ⁴. Certain commentators have held that this function of the general meeting can be delegated to the board ⁵.

AG § 149 (1) differs in some respects from HGB § 278 (1) (first and third sentence). Contrary to the former regulation, it is not the fact itself that the former capital is fully, or almost fully, paid-up that is decisive for a further increase, but the possibility, or, perhaps, the probability, of the payment of the still uncalled or unpaid capital ⁶. A resolution in general meeting made prior to the time when the whole previous capital is fully paid-up is, however, valid. Conditional resolutions regarding increase are permitted ⁷.

1. Cf. supra p. 160, note 1.

2. Compare with HGB § 275 (1).

3. AG §§ 146 (2) and 149 (2). Cf. Teichmann-Koehler, pp. 373-375.

4. AG § 149 (3).

5. Ritter, p. 480 ; Teichmann-Koehler, p. 314.

6. Teichmann-Koehler, pp. 375-376.

Contrary to Scots and English Law, the prolonged existence of an un-called or unpaid capital is considered in German jurisprudence as being contrary to the basic principles of common law as regards companies, since, as has been asserted by Brodmann and others, a special type of shares linked with an obligation to make additional payments ("Aktien mit Nachschusspflicht") is thereby created. Cf. Ritter, p. 480. In my opinion this point of view is erroneous, since there are in reality no additional payments provided for which would be beyond the figure the shareholders have initially subscribed for.

7. Ritter, p. 481.

AG § 150, which concerns qualified increase, corresponds more or less to HGB § 279, though it differs textually from it ¹. It provides that all the conditions of an issue of new shares for a consideration other than cash must be specified in the resolution. Contrary to the regulations of the HGB, previous and adequate notice of such a resolution must be given in the agenda. The regulations concerning filing of the resolution on increase with the registrar ² remained on the whole the same, though it is noticeable that fewer formalities ³ are required in this connection. Such a notification has to state the amount of the not yet paid-up shares ⁴, and the reason why their payment has not yet been made ⁵. It is considered as not quite satisfactory for the company simply to declare in such a notification that the whole capital is called up ⁶, since that would not show the amount of the not yet paid-up portion of the capital. The registrar is entitled to refuse registration when it is apparent that the value of the increase for purchase of property, or for payment of services ⁷ is below the face value of the corresponding shares. ⁸

1. Teichmann-Koehler, pp.377-378.

2. G. : "Handelsregister".

3. Previously (cf. Staub, p.490) the signatures of all the members of the board were required ; now, however, only such a **number** of signatures is required as is specified by the charter.

Cf. AG § 70, and Ritter, pp.484-485.

4. G. : "rückständige Einlagen".

5. AG § 151 (2). Cf. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Berlin 1937, p.502.

6. Ritter, p.485.

7. Cf. supra p. 53 and note 2.

8. AG § 151 (3).

The principles of successive formation¹ are strictly applied to increase of capital. The subscription itself is considered as a contract between the company and the subscriber². This contractual character is essential even for the relationship between the company and the shareholder who is entitled to acquire the new shares on the basis of pre-emption.

Pre-emptive rights³ are still considered as a part of the rights of the shareholder intrinsic to his status as a member. Contrary to American conceptions⁴, the stress lies more on the obligation on the part of the company to allocate a certain amount of shares to existing shareholders, if they demand it. Since this obligation is linked with a time-limit of at least two weeks⁵, even existing shareholders have to go through the procedure of a formal subscription. Therefore, pre-emptive rights are under German Law in some way a privilege in that the subscription⁶ is at first available to the existing shareholders⁷, and only thereafter to the

1. G. : "Stufengründung, Successivgründung". Cf. Teichmann-Koehler, pp.379-380. Cf. supra p. 53 and note 3.

2. Ritter, p.486.

3. G. : "Aktienbezugsrecht". On the legal nature of pre-emptive rights in German company law see : R.v.Godin and H.Wilhelmi, op.cit., pp.508 ff.; R.Mueller-Erzbach, pp.92 ff.; Rauch, vol.II, pp.70 ff.; Teichmann-Koehler, pp.380 ff. Older literature is mentioned supra p.153, note 6.

It is curious to note that, contrary to American Law, the German term Bezugsrecht denotes rather only an individual right to demand the allocation of certain shares, and not a right to purchase them, as it seems it should when we remember the primary meaning of "emptio". Cf. supra p. 155, note 1.

4. Cf. infra p.233, note 2.

5. AG § 143 (1).

6. G. : "Zeichnungsschein". Cf. Teichmann-Koehler, p.382.

7. It is worth while noting that this pre-emptive right becomes, as from the moment of the registration of the completed increase, an alienable right. Cf. AG§ 158, and Teichmann-Koehler, pp.381 and 387.

general public. Thus, the offer of an existing shareholder differs from the usual offer of any member of the general public in its priority in time. In this sense, it cannot be rejected, and these pre-emptive rights have almost peremptory force ¹. It is curious to note that in the case where the company, contrary to its obligations, allocates the shares to a newcomer and not to the existing shareholder to whom they should be allocated, such an allocation is, according to German Law, still valid, and the shareholder has merely the right of compensation for the damage caused through "non-performance" ², and does not have the right to demand a new set of similar shares ³.

The company may ⁴ exclude pre-emptive rights altogether but only in the resolution on the projected increase, and not prior to it ⁵. This exclusion can even be conditional, or indirect ⁶. The decision to exclude these pre-emptive rights requires the usual majority of three quarters ⁷

1. Ritter, op.cit., p.490.

2. G. : "Nichterfüllungsschaffen".

3. Ritter, p.490.

4. However, the general practice is to exclude these rights, or, at least, to delegate them to a neutral trustee (usually to a bank) that allocates them later to the shareholders desiring these shares, or to persons other than shareholders. This delegation of pre-emptive rights to a bank is, again, an example of pre-emptive rights of non-shareholders. This neutral trustee has all the usual rights of a shareholder as long as the final allocation of the shares has not taken place. Cf. Teichmann-Koehler, p.383.

5. AG § 153 (3) : "Das Bezugsrecht kann ... nur im Beschluss über die Erhöhung des Grundkapitals ausgeschlossen werden". This word "only" ("nur") should mean that an exclusion in advance is illegal. Ritter (p.491) tries to explain it differently.

6. Ritter, p.492.

7. Cf. H.Trumpler, Die Bilanz der Aktiengesellschaft nach neuem Aktien- und Steuerrecht, Berlin 1937, p.211.

but the charter may provide for a greater ¹ majority and other requirements too, e.g. a special quorum ². A promise of the company to allocate the new shares to a newcomer is invalid if it was made prior to the resolution on increase ³, and is valid a f t e r that only with the proviso that there might be a possible exercise of pre-emptive rights by some of the shareholders. ⁴

The resolution in general meeting to increase the capital is merely an indication of the company's intention. The fact of a completed increase has to be therefore especially notified ⁵, but it is possible to link together both notifications ⁶, i.e. the notification mentioned in AG § 151 (1), and the notification of a completed increase. The formal entry by the registrar of completed increase of capital brings the increase into effect ⁷. All the details about the completed increase have to be set forth in the official announcement of the entry ⁸. Only after the completion of this entry is it permissible to issue new share documents, or interim certificates ⁹ for the

1. Contrary to AG § 149 (1), where the expression "other majority" (G. : " ...andere Kapitalmehrheit") was used, this AG § 153 (3) - and, concerning conditional increase, AG § 160 (1) - spoke about a "greater majority" (G.: " ... grössere Kapitalmehrheit"). This difference was not appreciated by Ritter (p.493, d).

2. Teichmann-Koehler, pp. 380 and 383.

3. AG § 154 (2).

4. AG § 154 (1). Cf. Teichmann-Koehler, p.384.

5. AG § 155. Cf. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Berlin 1937, p.513.

6. AG § 155 (5). This is identical with the former HGB § 285. Cf.Staub, p.505.

7. AG § 156. This is a new regulation. Prior to that such an entry possessed merely a declaratory function, and did not legally constitute the fact of an increased capital. Cf. Ritter, p.497 ; Teichmann-Koehler, p.386.

8. AG § 157. This is similar to the former HGB § 284 (4).

9. G. : " Zwischenschein".

new shares in the increased capital ¹, but the subscriber becomes a member of the company prior to that, i.e. at the moment of the formal entry by the registrar ². Neither could the rights ³ attaching to the shares of the increased capital be transferred or dealt with prior to this entry.

The next suparagraph ⁴ is devoted to a new institution within the framework of German Company Law - the conditional increase ⁵. It is, in its way, quite alien to the company law principles of Anglo-American Law, and it was once suggested that it was a purely German creation ⁶. Looking back, however, one comes to the conclusion that this juridical creation has proved to be rather abortive ⁷. The main purpose of this variety of increase was to vest in the holders of convertible bonds ⁸ the right either to exchange these bonds against newly created shares ⁹, or to subscribe

1. AG § 158.

2. Teichmann-Koehler, p. 387.

3. G. : "Anteilsrechte".

4. AG §§ 159 - 168.

5. Cf. supra p. 45.

See also : Rauch, vol.I, p.18, and vol.II, pp. 55 ff.; Ritter, p.498 ; H.G.Tasse, "The new German Company Law", in : "Bell Yard", vol.20, London 1937, p.22 ; and Teichmann-Koehler, pp. 387-394.

6. H.W.Schmid, Die Erhöhung des Grundkapitals bei der Aktiengesellschaft, (typewritten thesis) Basle 1938, p. 84.

7. A.Wieland ("Kritisches zum Kapitel der Grundkapitalveränderungen nach dem neuen Aktienrecht", in : ZSR, vol.57, Basle 1938, p.7) in 1938 did not recommend the introduction of this institution into Swiss Company Law. It did, however, influence a Hungarian draft on company law. Cf. Hallstein, p. 187.

8. G. : "Wandelschuldverschreibung".

9. This right of the bondholders was called in German "Umtauschrecht". Cf. : Heinrici, "Zur Frage der Kapitalbeschaffung bei Aktiengesellschaften", in : G , vol.67, Berlin 1925, p.379.

preferentially for new shares ¹. From an economic point of view, this was only a palliative to the efforts of a company to attract new capital, since a new bondholder possessed not only the title of creditor, but the ability to become, either in exchange, or additionally, a shareholder. This conditional increase was created ² merely to enable the company to satisfy the appetite of the bondholders for new shares, and it is so called in that the increase is conditional on the wish of the bondholders to become shareholders. The amount of conditionally increased capital cannot surpass half the amount of capital that existed before such an increase ³. The special resolution to increase capital in this fashion, i.e. "conditionally", has to contain all details about the rights of the bondholders to exchange their bonds, or to demand the allotment of new shares. These rights have to be "inalienable" ⁴, and all later resolutions in general meeting on these matters of are considered invalid if they are contrary to this principle inalienability ⁵. Such a conditional increase of capital could be effected either in

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1. G. : "Bezugsrecht". These rights are in many respects (and not only terminologically) similar to the pre-emptive rights of shareholders, though it is curious to note that the usual pre-emptive rights of the shareholders are legally excluded as soon as these rights (in connection with a conditional increase) come into operation. It was, however, stated by some of the authors that these are the pre-emptive rights that could sometimes be attributed to non-shareholders. Bondholders are, of course, not exactly shareholders.
Cf. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, pp.520 ff.; Ritter, p.499 ; Teichmann-Koehler, p.381.
Cf. supra p. 56, note 3.
 2. The conditional increase was a result of an interim order of 1934.
Cf. R.v.Godin and H.Wilhelmi, op.cit., p.518 ; H.Trumpler, Die Bilanz der Aktiengesellschaft nach neuem Aktien- und Steuerrecht, Berlin 1937, p.120.
 3. AG § 159 (3).
 4. G. : "unentziehbar". Cf. AG § 159 (1). See also : Heinrici, op.cit., p.376 ; Ritter, pp. 499-500.
 5. AG § 159 (4). Cf. Ritter, p.501 ; Teichmann-Koehler, p.392.

favour of bonds issued simultaneously with or previously to the date of increase, but, equally, it could be done "in advance" too, i.e. in favour of future bonds, issued at a later date ¹. The majority required for the relevant resolution in general meeting is exactly the same as for a regular resolution on increase. The difference lies only in the provision that the charter may require a g r e a t e r majority ². Shares created and share documents issued on the basis of such a conditional increase are called "shares on demand" ³. Such a conditional increase can be at the time a qualified increase, i.e. for purchase of property, or payment for services ⁴, though it is actually possible only in the case where the bonds of a company have a very low price. Contrary to the normal increase, a conditional increase of capital is considered as completed and the capital as legally increased immediately on the issue of the "shares on demand" ⁵.

The third subparagraph ⁶ is devoted to the authorized capital ⁷, which as an institution was also an innovation to German Company Law at that time ⁸. The term used in the heading of this subparagraph and at the

1. Ritter, p. 500.

2. Cf. supra p. 165, note 1.
See also : Ritter, p.502.

3. AG §§ 161 ff.:" Bezugsaktien".Cf. R.v.Godin and H.Wilhelmi, op.cit., pp.527 ff.

4. AG § 161 (1). Cf.R.v.Godin and H.Wilhelmi, op.cit., pp.526 ff.; Teichmann-Koehler, p. 392 (d).

5. AG §§ 161 (2), 164 and 167. Cf. R.v.Godin and H.Wilhelmi, op.cit., p. 538 ; Ritter, p.503 (3) and p.507 ; Teichmann-Koehler, p.390.

6. AG §§ 169-173.

7. G. : " genehmigtes Kapital".

8. H.G.Tasse, "The new German Company Law", in : "Bell Yard", vol.20, London 1937, p.22 ; Teichmann-Koehler, pp. 394 ff.

end of AG § 169 (1) - "Genehmigtes Kapital" - obviously indicates the affinity with the "authorized capital" of Anglo-American systems of law¹, though the terms themselves are not identical, and there are more differences than common ground if we compare German Law with, say, Scots and English Law. When speaking about a case of normal increase of capital, German Company Law does not mean that the amount of increase is the maximum which can be reached in instalments², though there are signs that, mainly under the influence of English Law, the aura of sanctity surrounding the maximum figure in a resolution on increase is fading away considerably. In older law, the whole subscription for an increase was considered invalid if the figure aimed at was not reached within the set time limit. Now, however such a resolution may contain a clause providing that in any event the capital is to be considered as increased up to whatever figure has in fact been achieved by subscription³. Thus, even in the case of a normal increase within the meaning of AG §§ 149-158, two figures could be mentioned together in the resolution : the maximum one, and the one actually achieved.

1. F.A.Mann, "The new German Company Law and its background", in : JCL, vol.19, London 1937, p.236 ; Ritter, p. 508.

2. It is curious to note that there was at least one attempt in the nineteenth century to introduce this institution of "authorized capital", as it is now known in Anglo-American Law. While debating on a new Saxon Company Code in 1837, it was suggested that the capital item mentioned in the Statuten should be considered merely as a maximum, and that it could be collected in instalments. Cf. H.Schumacher, Die Entwicklung der inneren Organisation der Aktiengesellschaft im deutschen Recht bis zum ADHGB, Stuttgart 1937, p.43.

3. Ritter, p.487.

The special subparagraph on "authorized capital" ¹ provides, however, for a quite different possibility, namely, for a very limited form of delegation ² of this right to the board ³. This delegation can be provided for either in the original charter of the company, or in a resolution on alteration of the charter ⁴, but in both cases the maximum amount of capital should be reached by the board within five years ⁵. Another limitation is a financial one : similar to the provisions of AG § 159 (3) ⁶, the maximum amount of capital increase by way of this "authorized" method cannot be higher than 50% of the fixed capital provided for in the charter ⁷. Contrary to the provisions on conditional increase ⁸, an additional sanction by the council of the company ⁹ is required ¹⁰. The regulations concerning subscription and pre-emptive rights are to be applied equally

1. AG §§ 169-173.

2. G. : "Ermächtigung".

3. Rauch, vol.I, p.17.

4. If the charter does not contain such a provision, the company has no power to increase the capital in this way without amending the charter. According to AG § 169 (2) this requires the usual three-quarter majority. The charter could, of course, require another, i.e. a greater, majority.
Cf. Teichmann-Koehler, p.397.

5. Teichmann-Koehler, p.397.

6. Ritter, p. 509.

7. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Berlin 1937, p.544 ; Teichmann-Koehler, p.397.

8. AG §§ 159-168.

9. G. : "Aufsichtsrat". Cf. H.Goldschmidt, English Law from the foreign standpoint, London 1937, p.171 and note 3.
There is no parallel in Scots and English Law to this "council of supervision" in some of the Continental systems of law.

10. AG § 169 (3).

in this case too. An exclusion of pre-emptive rights could be effected by the board ¹. In case of a multifirmity of shares the delegation clause ² has to mention all details about the grouping of the new shares, especially in the case when voteless preference shares were issued ³. Similarly, an increase in this way may be at the same time a qualified one, provided only that the clause of delegation provides for it ⁴.

Initially there was a great gulf between the basic conception of capital in German Law on the one hand, and in the Anglo-American systems of law on the other ⁵. German Law, like the majority of Continental systems of law, considered as the capital of the company the maximum amount of the shareholders' responsibility as an invariable figure, and as stated in the charter and in the balance sheet. There was usually very little difference between the amount of the nominal and the paid-up capital. But under the permanent influence of Anglo-American systems of law, the rigour of this German conception has been gradually weakening. Whereas both Scots and English Law largely neglect cases of increase within the framework of authorized capital ⁶, German Company Law still provides in all details for

1. Rauch, vol.I, p.17, note 3 ; Ritter, p.510.

2. AG § 169 (1).

3. AG § 171 (2)(3). Cf. Ritter, pp.373-375 and p.511 ; H.W.Schmid, Die Erhöhung des Grundkapitals bei der Aktiengesellschaft, nach deutschem und schweizerischen Recht, (typewritten thesis) Basle 1938, p.70.

One has to bear in mind that the assent of the holders of these preferential shares would have been essential in the case of a normal increase of capital too. This assent has to be sought for at the time of an alteration of the charter, when inserting there the clause of delegation. When, however, the delegation clause was already in the original charter, or - when the board decided to increase the capital within the framework of such an "authorized capital", no assent of the preferential shareholders was needed.

4. AG § 172 (1).

5. Hallstein, p.181.

6. Cf. supra p. 72.

the procedure that should be observed in such a case. Principles of "authorized capital" became apparent in German Law not only in the form of a rather limited delegation to the board, but also, as mentioned above ¹, in the facility of inserting a clause in the formal resolution on increase stating that it is not essential to reach by subscription the figure set for this purpose, in which case whatever amount is actually subscribed would be considered as binding.

The third and last subdivision of the sixth chapter of the new German Companies Act is devoted to Reduction of Capital ². Here again are three "subparagraphs" : on the normal form of reduction ³, on a specially "facilitated" form of reduction ⁴, and on reduction by redemption ⁵. Any reduction is in principle considered as an amendment of the charter ⁶.

AG § 175 (1), which corresponds to the former HGB § 288, provides that a reduction of capital requires the usual three-quarters majority ⁷. The charter may, of course, provide for a greater majority, and for other requirements also, e.g. that of a special quorum. The general meeting is not entitled to delegate this power. In case of a multifirmity of shares the same majority has to be obtained in all group meetings of the share-

1. Cf. supra p. 169.

2. AG §§ 175-194. Cf. Teichmann-Koehler, pp. 404 ff.

3. G. : "ordentliche Kapitalherabsetzung".

4. G. : "vereinfachte Kapitalherabsetzung". Cf. R. Rosendorff, "The new German Company Law and the English Companies Act", in : JCL, vol. 15, p. 249 ; H. Trumpler, Die Bilanz der Aktiengesellschaft, Berlin 1937, p. 208.

5. G. : "Kapitalherabsetzung durch Einziehung von Aktien".

6. Ritter, p. 516 ; Teichmann-Koehler, pp. 402 and 406.

7. H. Trumpler, op.cit., p. 209.

holders. The proposed reduction has to be mentioned in the agenda ¹. Resolutions on reduction have to contain clauses concerning the background, the purpose, and the method of the projected reduction ². AG § 175 (4) mentions explicitly only two ways in which a regular reduction can be achieved : either by diminution of the nominal amount of the shares, or by consolidation of the shares ³. Though the AG does not explicitly provide for the different types of reduction, as e.g. with and without repayment, by cancellation, or by diminishing of the liability concerning unpaid shares, they are all, nevertheless, possible under German Law, and are, indeed, met with in practice.

German Company Law provides that diminution of the nominal amount of the shares is the normal method of reduction ⁴. Though this way is not expressis verbis mentioned in Scots and English Law, it is nevertheless one of the ways in which a reduction can technically be made ⁵. Consolidation of shares is also considered as a species of the diminution of the nominal amount ⁶. Cancellation of whole shares, so common in Britain, was treated by German jurisprudence as a rather "uncommon" type of reduction, and referred to as "reduction by redemption" ⁷.

1. AG § 175 (2).

2. Ritter, p.516 ; Teichmann-Koehler, pp.403 ff.

3. This latter way is, however, admissible only in the case where a diminution of the nominal amount of the shares is not possible owing to provisions about the minimum amount of shares. This is an item quite unknown in Scots and English Law. Cf. Teichmann-Koehler, p.409.

4. Teichmann-Koehler, p. 403.

5. Cf. supra p. 91.

6. Ritter, p. 517.

7. It could, however, be called "uncommon" only in contrast to the "common" or normal type of reduction ("ordentliche") in the sense of AG §§ 175-181. In reality, it is one of the types most frequently in use.

The notification of the resolution for a reduction of capital is regulated in the same way as in the case of an increase ¹. The capital is considered as de jure reduced from the moment of the formal entry by the registrar of the resolution for reduction ², but, contrary to the procedure on increase ³, the capital is considered as reduced from the moment of registration of this f i r s t resolution for reduction, without any second resolution ⁴. Again, contrary to Scots and English Law, which now recognizes a far reaching right of the court to decide whether rules for the protection of the interests of the creditors are to be applied ⁵, German Company Law still sticks invariably to the old institution of the protection of creditors ⁶, though in one respect there is a remarkable simplification of the formalities : special advertisements and obligatory letters to the known creditors, calling them to file their claims, have been abolished ⁷. This right of the creditors to demand either satisfaction or security ⁸ exists independently of whether it is a reduction with or

1. AG §§ 151 (1) and 176.

2. AG § 177. Cf. Teichmann-Koehler, p.411.

3. AG § 156.

4. Ritter, p. 518.

5. Cf. supra pp. 95-97.

6. Teichmann-Koehler, p. 404.

7. H.Trumpler, Die Bilanz der Aktiengesellschaft, Berlin 1937, pp. 209 and 216.

8. Cf. supra p. 99 (2).

Under the older German Law of the HGB, the creditors were not formally entitled to demand security (G.: "Sicherung, Sicherheit, Sicherheitsleistung"). Cf. Ritter, p.521.

without repayment ¹. The resolution for reduction, which is published by the registrar, has to mention this right of the creditors ² and has to impose a time limit of six months ³ within which all the claims of the creditors should be filed. Payments to the shareholders, if any are provided for, can be made only after the lapse of this induciae of six months, and after satisfaction or security has been given to all shareholders who have notified their demands within the prescribed time ⁴.

As in Scots and English Law, the company is free to decide that a reduction by repayment does not necessarily mean a simultaneous diminution or extinction of the liability ⁵. Thus, an authorized capital may be retained above the level of the reduced capital. The opposite case is also possible, i.e. when the reduced amount is entirely composed of not yet paid-up shares ⁶. A mixture of both types is also possible ⁷.

1. AG § 178 (3).

2. AG § 178 (1).

3. It was formerly, under the HGB, a term of one year, known under the technical nickname "Sperrjahr" (cf. supra p. 158). Now the more appropriate term "Sperrfrist" is used. Cf. R.v. Godin and H. Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Berlin 1937, p. 571 ; Teichmann-Koehler, p. 408 ; H. Trumpler, op.cit., pp. 209 and 216. Zingg (p. 45) notices that these periods of induciae are becoming shorter in Companies Acts everywhere and explains this as a means to cut down expenses. He thinks that the increasing facilities for avoiding interference by the court serve the same purpose of economy. It is submitted that for these reasons the danger of contravening the interests of the creditors might not be too great any more.

4. AG § 178 (2).

5. Cf. supra p. 108.

6. Since such a manipulation is legally still a reduction of capital, the clause about the induciae of six months (AG § 178) has to be applied here also, and the shareholders continue to be liable for calls until all creditors who have notified the company about their claims have received either satisfaction, or security.

7. Ritter, p. 522.

The next section ¹ is devoted to the technical side of a reduction, namely the procedure leading up to the financial reduction, and consisting in, e.g. the exchange of share documents ², the over stamping or docketing of these documents, consolidation ³, or any other similar technical act. The company is entitled to ask the shareholders to hand in their previous share documents in order that they may be rectified ⁴. The company is entitled to threaten the forfeiture ⁵ of those share documents which are not presented or handed in on the company's instructions. However, the company is not obliged to forfeit these documents. The threat of forfeiture has to be mentioned in the announcement of the company ⁶ calling for the handing in of the old share documents for exchange, docketing etc. It has been stated in this connection that the forfeiture of a share document does not automatically involve the end or alteration of the relationship between the owner of the forfeited shares and the company ⁷.

1. AG § 179.

2. The opinion - somewhat surprising - was expressed by some German jurists that in a case of a reduction of capital by diminution of the nominal value of the shares, a technical exchange of older share documents against new share documents bearing the new nominal value of the shares would be permissible only with the consent of a 1/1 the shareholders. Cf. Teichmann-Koehler, p. 410.

3. "Consolidation" as one of the forms of reduction (AG § 175, IV, 1) differs somehow from the technical procedure of a "joining" of share documents (AG § 179, I) though the German text uses in both cases derivative forms from the same verb "zusammenlegen" (i.e. "to put together"). A third meaning was attributed to the same word when it was indicating a special contract - "Zusammenlegungsgeschäft" (Ritter, p. 524), i.e. an agreement about a putting together, or a contract between the company and the shareholders about the consolidation of the shares. Cf. R.v. Godin and H. Wilhelmi, op.cit., pp. 574 ff.

4. G. : "Berichtigung". Cf. also AG § 67, and Ritter, pp. 221-223 and pp. 523-526.

5. G. : "Kraftloserklärung". The company possesses this right of forfeiture without any special resolution in general meeting. Cf. Teichmann-Koehler, p. 409.

6. AG § 179 (2). Cf. R.v. Godin and H. Wilhelmi, op.cit., pp. 577 ff.; Teichmann-Koehler, p. 410.

7. Ritter, p. 524.

When the number of shares handed in by the shareholder for exchange or otherwise is not sufficient for him to receive at least one share under the new scheme of the division of the company's share capital, the normal procedure is either to buy the necessary remainder of old shares, or to sell the superfluous old shares ¹. Usually the shareholders ask the company to buy or sell these shares on their behalf. In the case where a shareholder has failed to authorize the company to act on his behalf, the company has the same right to exact forfeiture ². The declaration of forfeiture of such share documents is usually followed by the sale of the new share documents which should have been issued instead of the forfeited ones. The company sells these shares on account of their former owner for the official stock market price, but in the event of no official price for the particular shares being known, the sale is conducted by means of an auction ³.

The normal procedure for notification of the completion of the reduction of the capital corresponds entirely to the procedure observed in connection with increase of capital ⁴. The difference lies, however, in the time from which the altered figure of capital comes into force ⁵.

The AG implies that a reduction-cum-increase is feasible ⁶. This is an innovation. Unlike Scots and English Law, German Company Law has since 1923 required the principle of a minimum capital, i.e. the principle that a

1. Ritter, p. 524.

2. AG § 179 (1)(second sentence).

3. AG § 179 (3). This regulation corresponds to HGB § 290.

4. AG §§ 180 (1)(2) and 155 (1)(5). 5. Cf. supra p. 174.

6. Teichmann-Koehler, pp. 411-412.

public company must have a share capital that cannot be lower than a certain sum stated in the Companies Act ¹. AG § 181 allows for the possibility of reducing the capital below this minimum figure provided that the general meeting decides simultaneously that the share capital should be increased again so as to reach at least the legal minimum figure ². Such resolutions for reduction and increase ³ are, however, invalid, when they have not been filed with the registrar within six months from the time of their being made ⁴. There are, however, some situations where an extension of this time limit is made possible. Contrary to the previously mentioned rules on procedure ⁵, all three resolutions, i.e. for increase, (simultaneously) for increase, and (again simultaneously) on the completion of the reduction-cum-increase, can in this particular case be linked together, and expressed in one single notification to the registrar ⁶.

The next subparagraph ⁷ is devoted to a simplified or shortened form of

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1. This institution of a "minimum capital" was introduced into German Company Law only in 1923. Up till 1937 the minimum amount was 50,000 RM. After that, it was suddenly raised to 500,000 RM. After the currency reform of 1948, it was "altered down" to 100,000 DM.
Cf. A.Dueringer and M.Hachenburg, Das Handelsgesetzbuch, 3rd ed., vol.III, part 1, pp. 202 ff. ; F.A.Mann, "The new German Company Law and its background", in : JCL, vol.19, London 1937, pp. 227-228 ; Teichmann-Koehler, p. 20 (1).
 2. An increase of capital cannot be a qualified one when it is a part of a reduction-cum-increase. Cf. Teichmann-Koehler, p.412.
 3. G. : " ... Diese Beschlüsse .." (i.e. : "these resolutions").
 4. In the sense of AG §§ 155 or 180 respectively.
 5. AG §§ 155 (5) and 180 (2). Cf. supra p.165.
 6. AG § 180 (2)(in fine).
Cf. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Berlin 1937, p. 582.
 7. AG §§ 182-190.

reduction ¹. Compared with the previous subparagraph, the main difference lies in the way of dealing with the protection of the creditors' interests². this type of reduction could not be applied in all the cases where the normal type of reduction was possible. It is applicable only in the cases of a readjustment of capital owing either to losses sustained by the company, or to a revaluation of the assets ³, or in the case of recompletion of the legal reserve capital ⁴. But these are not by any means the only pre-conditions of the "applicability" of this form of reduction ⁵, since it is o n l y in the case where the legal reserves are already exhausted ⁶, and o n l y (and that matters !) when it is necessary to "replenish" these reserves with new capital that this type is of use ⁷.

1. It is curious to note that by number of sections, and, to a lesser degree, by the length of these legal provisions, this "subparagraph" surpasses by far the previous one where the "not-shortened" form of reduction is dealt with. It is really hardly possible to say that this is a s i m p l i f i e d form of reduction procedure. Cf. Ritter, p.528.

It is worth while noting, besides, that AG § 182 (2) refers to almost all sections of the previous "subparagraph", and then, as well, to the following eight sections of this "subparagraph". The sections about the protection of the creditors (e.g. AG § 178) are, however, n o t referred to. It may be said, perhaps, that every "simplification" demands an initial "ample" explanation of the situation. Historically this type of procedure was based on a law of 1931, published shortly after the very acute financial crisis of that time. Cf. A.Düringer and M.Hachenburg, op.cit., pp.47-48 ; R.v.Godin and H.Wilhelmi, op.cit., pp. 586 ff.; Teichmann-Koehler, p.413 ; H.Trumpler, Die Bilanz der Aktiengesellschaft, Berlin 1937, pp.209-210.

2. Teichmann-Koehler, p.412.

3. G. : " Wertminderung".

4. Ritter, pp. 528-529 ; Teichmann-Koehler, pp.412-413 ; H.Trumpler, op.cit., p.169.

5. AG §§ 183 and 186. Cf. R.v.Godin and H.Wilhelmi, op.cit., p.590.

6. Teichmann-Koehler, p. 415.

7. Ritter, p. 529.

This subparagraph is ius strictum, and therefore its contents and the sphere of its applicability could not be altered by the charter ¹. The resolution has to explain the reasons for reduction ². Contrary to the ordinary procedure of reduction, repayments to the shareholders are here illegal ³. The background of this strict rule is easily explained when we remember that the readjustment of sustained losses is, in practice, the only case where use can be made of this type of reduction ⁴. A curious regulation provides that in the event of it appearing during the first two years (following such an action) that the achieved reduction of capital, when brought about by means of a revaluation of the assets of the company, has been too great and will result in a new piling-up of reserves above the intended level, then the difference must be transferred b a c k to the legal reserve capital ⁵. Only after the lapse of these two years can the company pay the shareholders a dividend of more than 4% ⁶, but this can be done again only after the legal reserve capital has been refilled up to 10% of the figure of the reduced ("rump") capital ⁷. A higher dividend can,

1. Ritter, p. 529.

2. AG § 182 (1)(last sentence).

3. AG § 184. Cf. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Berlin 1937, pp.590-592 ; Teichmann-Koehler, p.415.

4. Ritter, pp. 530-531.

5. AG § 185. Cf. R.v.Godin and H.Wilhelmi, op.cit., pp.593 ff.; Ritter, p.531 ; Teichmann-Koehler, p.416 ; H.Trumpler, op.cit., pp. 210 and 220.

6. AG § 187 (2). This figure of 4% can be changed by a mutual decree of the Ministers of Justice and of State Economy. The modern editions of the AG still use the pre-1945 expression "Reichsminister"; though, at least in Western Germany, the corresponding officials now hold differently styled titles of office.

7. AG § 187 (1). Cf. Teichmann-Koehler, pp. 416-417-.

however, be paid if all those creditors have been satisfied or secured whose claims existed ¹ prior to the publishing of the registrar's announcement of the entry of reduction ; but these creditors must have filed their claims within six months after the publication of the annual report and the balance sheet ². This provision replaced the procedure of creditors' protection, as it was known in AG § 178. This "simplified" form of reduction has another unusual feature, namely, it can be applied retrospectively to the foregoing business year ³, i.e. the reduced figure of capital may be inserted in the balance sheet of the year preceding the year of the resolution on reduction. Like the normal procedure , this form⁴ can also be part of a reduction-cum-increase ⁵, and the privilege of retroactive force applies to the increase as well ⁶. A qualified increase is, however, not possible in this case ⁷. The great advantage of this type of reduction lies in the ease of diminishing a negative balance at once ⁸.

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1. G. : " ... vor der Bekanntmachung der Eintragung des Beschlusses b e g r ü n d e t worden waren".
 2. AG § 187 (1)(second sentence).
Cf. Ritter, p.533 ; Teichmann-Koehler, p. 418 (2).
 3. AG § 188. Cf. Ritter, pp.534-535 ; Teichmann-Koehler, pp.419-420 ; H.Trumpler, Die Bilanz der Aktiengesellschaft, Berlin 1937, p.217.
 4. AG §§ 182-191.
 5. AG § 189 (1). Cf. Teichmann-Koehler, p.420.
 6. R.v. Godin and H.Wilhelmi, op.cit., pp.602-604 ; Ritter, p. 536.
 7. AG § 189 (1)(second sentence).
 8. H.Trumpler, op.cit., p. 210.

The last subparagraph ¹ is devoted to reduction by redemption ². A redemption can be either forcible ³, or by purchase of the share by the company itself. The possibility of forcible redemption, i.e. of a redemption without the permission of the holder of that share, has to be stated in the charter, either in its original, or amended form ⁴, or, using a German phrase, "has to be born redeemable". The procedure of a normal reduction, including the provisions of AG § 178 (2) on the protection of creditors, has to be applied here also ⁵, except where fully paid-up shares are put at the company's disposal free of charge ⁶, or in consideration of a profit or a "free reserve" ⁷, provided that they have been shown in the balance sheet previously ⁸, but even then a resolution in general meeting is needed ⁹, though a simple majority is sufficient.

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1. AG §§ 192-194. Cf. R.v.Godin and H.Wilhelmi, Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, pp.608 ff.; Teichmann-Koehler, p.421.
 2. The Aktienrechtsnovelle of 1931 (cf. supra p. 159, note 1) tried to introduce a special term for this type of reduction : "Ermässigung des Grundkapitals" (i.e. diminution of capital), in order to denote and stress the difference between a normal or regular reduction and this type. This difference lay in two points ⁸ : concerning the modus of the protection of the interests of the creditors, and concerning the internal effect of the reduction. Cf. H.Trumpler, op.cit., p.211. May I submit that the idea of this terminological innovation was a borrowing from Scots and English Law. Cf. supra pp. 88-89.
 3. G. : "Zwangseinziehung". Cf. W.Schmidt and H.and A.Pinner, in : Staub's Kommentar zum Handelsgesetzbuch, Nachtrag zur 12.und 13.Auflage, Berlin 1932, pp.22 ff.Older Geram.literature : Hirschland, Einziehung von Aktien, Munich 1908.
 4. Ritter, pp. 538-540; Teichmann-Koehler, p.422.
 5. Ritter, p. 541.
 6. W.Schmidt and H.and A. Pinner, op.cit., pp. 27 ff ; H.Trumpler, op.cit.,pp.211-212.
 7. G. : "freie Rücklage".
 8. AG § 192 (3). Cf. Ritter, p.542 ; Teichmann-Koehler, pp. 421 and 424.
 9. AG § 192 (4).

German Company Law has acquired the peculiar fame of being the classical example where very minute and extensive provisions exist concerning readjustment of capital¹. Though Germany is perhaps not the first country² where special regulations have been needed to overcome the difficulties following a currency reform, or for a Gleichschaltung³ of a newly acquired territory, there is no doubt that Germany's expansive policy and two economic breakdowns after two lost wars gave the most excellent background for an abundance of "readjustment"-legislation.

1. Cf. supra pp. 60-61.

2. May I submit that all the countries that came into being by breaking up the Danubian Habsburg Monarchy, and by secession from Russia were with all probability the first ones where the need for readjustment of figures connected with share capital and the share amounts to the new currency introduced in these new states was an actual one. Thus, e.g. Estonia had to readjust her share capitals twice : in 1919 and in 1928, Latvia published her first readjustment decree in 1921, etc. Nonetheless, Germany can claim the biggest collection of readjustment decrees either in connection with currency reforms, or owing to territorial changes in Central Europe. The two main Acts about readjustment of capital were published in 1923 (the so-called Verordnung über Goldbilanzen) and in 1948 (the so-called DM-Bilanzgesetz). It was asserted by Rauch (vol.II,p.5) that the first of these two acts was drafted under a strong influence of French Law concerning the currency reform in the Saar, The re-incorporation of the Saar in 1935, the Anschluss of Austria in 1938, the incorporation of the Sudetian borderlands in 1938, the re-incorporation of the Memelland in 1939, the absorption of the Republic of Danzig in 1939, the annexation of Eupen and Malmedy in 1940, the extension of the German territory eastwards in 1941, the agglomeration of Alsace in 1941, and of Lorraine in 1942, etc.,etc.,gave good reason every time for readjusting the capital of the local limited companies to the currency regulations of the absorbing German Reich.
- Lit. : K.Ballerstedt, Kapitalgewinn- und Ausschüttung bei Kapitalgesellschaften,eine gesellschaftsrechtliche Betrachtung, Tübingen 1949; W.Beuck and H.Paret, D-Mark-Umstellungsbilanz in Recht und Praxis, Hamburg 1948; W.Beuck, Kommentar zum D-Markbilanzgesetz, 2nd ed., Cologne 1949; K.Geiler, A.Stehlik and H.J.Veith, D-Markbilanzgesetz,Kommentar, Munich 1950; E.Kretz,"Deutsches Aktienrecht, Reichsmarkeröffnungsbilanzen und Umstellungsmassnahmen im Lande Österreich", in : ZHR, vol.106, Stuttgart 1939, pp. 137 ff.; Teichmann-Koehler, pp. 332-342, p.346 (note 33), pp.401 ff., and pp. 593-625.
3. I wonder whether the usage of the German word Gleichschaltung has now acquired a better standing than the old English term "equalization", since its continued use by Toynbee ? Cf. Toynbee, vol.VIII, p.589, and vol.IX, p.554.

The most peculiar situation arose in connection with the last currency reform in Germany in 1948, which differed from almost all previous cases of similar currency reforms in one very important point, namely, there was practically no parity declared between the old RM and the new DM¹. Therefore a readjustment of share capitals and of the nominal values of shares could not be undertaken on the simple mathematical basis of one equation, but had to be based on a completely independent balance sheet, where all the assets were revalued and the remaining capital calculated without any fixed relation to the balance sheet of the pre-reform period. In view of the very heavy war-time and post-war losses² of the companies, special temporary accounts were created³ in order to help the companies to overcome the difficulties connected with a general readjustment to the new economic circumstances. These special currency reform regulations also contained various points directly or indirectly connected with alteration of capital.

Though these provisions of German Company Law have to be considered as temporary legislation⁴, and although they are in many ways reminiscent of legislative preambles or prefatory rules on application of a new law, two

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1. Though it is beyond the framework of this study to pay tribute to the phenomenon of German economic rebirth after 1948, it should nevertheless be mentioned that this currency reform might have been one of the financial elements that made this recuperation possible. Cf. T. Balogh, Germany : an Experiment in "Planning" by the "Free" Price Mechanism, Oxford 1950 ; H.C. Wallich, Mainsprings of the German revival, Oxford 1956.
 2. G. : "Kriegs- und Kriegsfolgeschäden".
 3. The most popular accounts were : the capital depreciation account (G.: "Kapitalentwehrtungskonto"), and the lost capital account (G.: "Kapitalverlustkonto"). Cf. K. Geiler, Stehlik and Veith, op.cit., pp. 274 and 284, p. 314 and passim.
 4. Cf. infra p. 186, note 4.

achievements can nonetheless be put to their credit, namely, it was stressed that these alterations of capital were neither a form of increase, nor reduction ¹, nor of a reduction-cum-increase, but were merely an amendment of the figures of the capital and of the shares, and, secondly, that no duty whatsoever was payable in connection with such a manipulation ². This law provided special rules on the valuation of the assets and liabilities of the company. If, according to these rules, after the deduction of all the liabilities from all the assets of the company, a residue of more than DM 50,000 could be stated in the opening balance sheet expressed in the new currency, the company would be considered as capable of constituting its share capital at least at the level of the newly created legal minimum of DM 50,000 ³. The main purpose of this special law of 21st August, 1949, ⁴ was to find a remedy for those numerous cases where the company was unable to find this sum of DM 50,000 as a residue of such a calculation. If a company was able to constitute such an initial share capital of at least DM 50,000, this act was called the final resettlement of capital ⁵ and such a company had to proceed after that

1. K.Geiler, Stehlik and Veith, D-Markbilanzgesetz, Kommentar, Munich 1950, p.351.

2. Rauch, vol.II, p. 47, note 3 ; Teichmann-Koehler, p.332.

3. Cf. supra p. 178, note 1.

The minimum amount of capital of DM 100,000 provided for in § 7 of the AG of 1937, as amended after the currency reform, does not apply to the old companies, which, according to § 44 of this special law, have the privilege of starting under the new currency regime with merely half of that amount - DM 50,000.

Cf. K.Geiler, Stehlik and Veith, op.cit., p.260 ; Teichmann-Koehler, p.332 (15).

4. G. : " Gesetz über die Eröffnungsbilanzen in Deutscher Mark und Kapitalneufestsetzung" (officially published in : "Gesetzblatt der Verwaltung des vereinigten Wirtschaftsgebietes", 1949, Nr. 32, pp. 279 ff.), usually called the DM-Bilanzgesetz.

5. G.: " ... endgültige Neufestsetzung des Grundkapitals".

strictly in accordance with the provisions of the AG of 1937, none of the privileges of this special law having any effect upon them¹. In the opposite case, however, the similar act of constituting the new share capital of the company was called the preliminary resettlement of capital², and the companies had the full amount of all the possibilities and privileges provided for by this special law.

The above mentioned temporary accounts³ served as counterbalances of the fictitious figure of a share capital of DM 50,000, that had to be mentioned among the company's liabilities in its balance sheet. If the company in a set time⁴ managed to equalize these accounts⁵, the company's preliminary resettlement of capital would turn automatically into a final one. In the opposite case, the company would have to look for other means of financing itself (in order to fill up its capital to the required amount), or, else, to wind up, or convert itself into another type of

1. Teichmann-Koehler, p. 332.

2. G. : " ... vorläufige Neufestsetzung des Grundkapitals".

3. Cf. supra p. 184, note 3.

4. A time limit of three years was provided for in case of a "regular" capital depreciation account, and six years for an "irregular" one. Cf. Teichmann-Koehler, p. 355.

Since this special law set 31st December, 1951, as the final date before which all companies should resettle their capital and bring it into line with the new currency it is possible that some of the "irregular" capital depreciation accounts may still (1956) be left on the balance sheets of German public companies. This law, as a whole, has, however, lost its relevance already, since the adjustment of capital to the new currency has been achieved almost completely.

5. K. Geiler, Stehlik and Veith, op.cit., p. 274 and pp. 314 ff.

companies, e.g. a G.m.b.H.¹. Another purpose of this special law was to avert a too quick distribution of dividends, since, after the currency reform, that could easily enough endanger the creditors' interests².

A capital depreciation account could in no case be higher than a half of the figure mentioned in the balance sheet as share capital; this account had to be the only reserve account. No distribution of dividends was allowed while such an account was still on the balance sheet among the assets of the company³, and to counterbalance this, veto-like irrevocable pre-emptive rights⁴ were attributed to all the shareholders concerning all new shares⁵.

Instead of, or parallel to the capital depreciation account the company possessed another means of counterbalancing a fictitious nominal figure of share capital, namely, to built up a special lost capital account.⁶ This account could be built up by sums representing the war-time and post-war losses of the company, but could in no case be higher (in the new currency) than the figure of the previous share capital (in the old currency)⁷. In the case where only a lost capital account was built up, the shareholders had only a "normal" type of pre-emptive rights⁸, and not the irrevocable ones, as would have been the case when a capital depreciation account had been opened, either with or without a lost capital account.

1. K.Geiler, Stehlik and Veith, D-Markbilanzgesetz, Kommentar, Munich 1950, p.305.

2. Teichmann-Koehler, p.333.

3. K.Geiler, Stehlik and Veith, op.cit., p.271

4. K.Geiler, Stehlik and Veith, p.285.

5. Ibid., pp. 284 ff.

6. Ibid., pp.277 ff.

7. Teichmann-Koehler, p.336.

8. K.Geiler, Stehlik and Veith, op.cit., p.285.

A resettlement of capital, though it was still considered as an amendment of the charter, did not require a qualified majority, or any voting in class or group meetings, even if the charter provided for that ¹. However, a minority of 10% of the share capital was considered sufficient to achieve a postponement of a decision on such a resettlement of capital. The usual majority, provided for in the charter, was, however, required as soon as this became not merely an act of resettlement of capital in the sense of this special law but at the same time an increase of capital by issuing new shares or otherwise ². Similarly, the usual majority and the usual voting in class or group meetings was required to alter the rights of the shareholders ³. A special procedure for docketting ⁴ the share documents with their new nominal value was provided for ⁵. This special law provided also for special regulations concerning those cases of increase or reduction which were decided but not yet filed prior to the date of currency reform (21st June, 1948), or in the time between the currency reform and the promulgation of this law ⁶.

1. Teichmann-Koehler, p.337.

2. K.Geiler, Stehlik and Veith, op.cit., p.260.

A qualified increase was, however, impossible in this particular case.
Cf. supra p. 181.

3. Teichmann-Koehler, p. 338.

4. Cf. supra pp. 176-177.

5. Teichmann-Koehler, p.342 (26).

6. K.Geiler, Stehlik and Veith, op.cit., pp.440 ff.

6. S w i t z e r l a n d .

It was only during the last quarter of the nineteenth century that a unification of Swiss Law could be achieved. Up till then the Swiss cantons each had their own legal systems. Swiss cantonal law of that time could be divided into three groups of legal systems¹: those influenced by French Law², those belonging to Bernian Law³, and those belonging to the Law of Zurich⁴. The Swiss Code of Obligation of 1881⁵ was the first federal Swiss Law, and amongst other matters it dealt with the questions of Company Law⁶. Partial reforms of it were achieved in 1917⁷ and in 1919⁸, but in 1937, to some extent under the impact of the German Companies Act, a quite new system of company law was adopted.

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1. A.Egger, "Schweiz", in : "Rechtsvergl.Handwörterbuch f.Zivil- und Handelsrecht", (ed. by F.Schlegelberger) vol.I, part 1, Berlin 1927, p.227.
 2. These were the cantons of Geneva, Vaud, Neuchatel, Valais, Fribourg and Ticino. The first two of these cantons were also famous for their own peculiarities in their approach to legal questions.
 3. These were the cantons of Berne, Lucerne, Aargau and Solothurn. The influence of Austrian Law was apparent here.
 4. The cantons of Zurich, Schaffhausen, Zug, Grisons, Glaris, Nidwalden, St.Gallen and Thurgau.
 5. Lit.: G.Bachmann, "Aktiengesellschaft (Anonyme Gesellschaft) und Genossenschaften", in : "Das Schweizerische Obligationenrecht" (ed.by A.Schneider and Fick), Zurich 1915; Th.Guhl, Das neue Aktiengesellschafts- und Genossenschaftsrecht der Schweiz, Zurich 1937 ; J.Haberstich, Handbuch des schweizerischen Obligationenrechts, two vol., Zurich 1887 ; H.Hafner, Das schweizerische Obligationenrecht, 2nd ed., Zurich 1905 ; A.Schneider and H.Fick, Das schweizerische Obligationenrecht, 2nd ed., Zurich 1883; V.Rossel, Manuel du droit civil suisse, vol.III, Lausanne (s.a., after 1911).
 6. CO §§ 612-677.
 7. The Federal Law of 25th September, 1917.
 8. The Federal Laws of 8th July, 1919, and of 26th December, 1919.

The peculiarity of Swiss Law in general is that it exists in three ¹ authentic texts, according to the number of the three official languages of the federal state of Switzerland. One of them is German, and it is generally recognized that German is in most cases the original language of drafts that later become statute law, though, officially, all three texts are considered as equal ². Nevertheless, linguistically, syntactically and terminologically this Swiss German ³, as a legal language in Swiss Federal Statute Law, differs in many ways both from the legal German of Germany, and the legal German of Austria. The simplicity, elasticity and brevity of form in Swiss German is an asset which should not be overlooked. The impact of German Law on Swiss Law would only have been of technical interest, if the linguistic mastery of expression of the Swiss text did not make of the Swiss Code an achievement which in its brevity and elasticity ⁴ towers high above the level of its German model. One has to bear in mind that Swiss Company Law in particular is an achievement, since the Swiss managed to adopt alien ideas without at the same time importing exaggerated machinery to supervise the economic life and the investing activities. To a certain extent therefore, Swiss limited companies resemble the private companies of this country much more than the public ones.

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1. The equality of the fourth Swiss language - Romansh - was recognized only in 1938, but it did not affect the constitution.
 2. It still happens now and then that these three texts are not quite identical. Cf. *infra* p. 198, note 2 ; p.199, note 1 ; p.200, note 2 ; and p. 206, note 6. The comparative edition by G.Wettstein ("The Swiss Federal Code of Obligations ...", Zurich 1928) unfortunately enough did not cover Company Law.
 3. The abbreviations SF and SG in footnotes of this chapter indicate the Swiss French and the Swiss German terms in legal texts. The latter ones are by no means identical with those used in Germany.
 4. A.Egger, *op.cit.*, pp. 229 and 231.

The Swiss Code of Obligations of 1881 was undoubtedly written under some influence of Austrian Law ¹, and of some of the German reform acts of the seventies ². The 26th chapter of this Code was devoted to company law ³. Only the following points concerning this 1881 Code need now be mentioned :

An increase of capital ⁴ was considered as a type of alteration of the charter ⁵, and the only conceivable mode of increase was by increasing the number of shares ⁶. The issuing of a prospectus in connection with an increase became obligatory only after 1919. Repayments in case of a reduction of capital ⁷ were treated analogously to those in the case of winding up ⁸,

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1. I.e. under the influence of the ADHGB which remained in force in Austria up to 1938.
 2. Hamburger, p.82.
 3. CO §§ 612-677. Cf. V.Rossel, Manuel du droit civil suisse, vol.III, pp.662 ff.and pp.722 ff.; A.Schneider and Fick, Das schweizerische Obligationenrecht, Zurich 1883, pp.446-497.
 4. Lit.: H.Buechler, Die Erhöhung des Grundkapitals mit Ausgabe von Gratisaktien nach schweizerischen Obligationenrecht, Berne 1926 ; E.Folliet, Le bilan dans les sociétés anonymes au point de vue juridique et comptable, Lausanne 1920 ; H.Sigrist, Die Erhöhung des Grundkapitals im schweizerischen Aktienrecht, Zurich 1930 ; H.Sträuli, "Veränderungen des Grundkapitals der Aktiengesellschaft nach dem schweizerischen Obligationenrecht", in : ZSR , vol.14, Basle 1895, pp.1-58.
 5. G.Bachmann, "Aktiengesellschaft (Anonyme Gesellschaft) und Genossenschaften", in : "Das Schweizerische Obligationenrecht"(ed.by A.Schneider and Fick), Zurich 1915, p.104 ; V.Rossel, op.cit., p.679 ; A.Schneider and Fick, op.cit., p.459.
 6. G.Bachmann, op.cit., p.105 ; Buechler, p. 3 and passim ; E.Folliet, op.cit., pp. 98 ff.; Rauch, vol.I, p.69, note 3 ; V.Rossel, op.cit., p. 662 ; Scherrer, p. 59 ; H.Sträuli, op.cit., pp. 24-34.
 7. Lit.: R.Cuënet, De la reduction du capital social dans les sociétés anonymes, Montreux 1925 ; T.Guhl, "Die Herabsetzung des Grundkapitals bei der Aktiengesellschaft", in : "Schweizerische Aktiengesellschaft", vol.6 (1934), pp. 179 ff.; H.Sträuli, op.cit., pp. 40 ff.
 8. CO § 670. Cf. G.Bachmann, op.cit., pp.218-219 ; Hamburger, p.84 ; E.Müller, Kapitalherabsetzung bei der Aktiengesellschaft, Berne 1938 ; V.Rossel, op.cit., pp.662 and 722 ; A.Schneider and Fick, op.cit., p.490 ; H.Sträuli, op.cit., pp. 46 ff.

and a decision in general meeting was necessary to this end ¹. Similarly to Scots and English Law of to-day, this Code of 1881 required no legal minimums for shares or the share capital ². The charter could provide for a special majority that might be higher than the legal requirements of votes for a winding up. In case of a multifirmity of shares special class meetings had to be summoned to participate in this decision. The system in which reduction of capital was treated in older Swiss law was not quite satisfactory. The notions "repayment" and "reduction" were considered as being opposite to each other ³. It was possible to reduce the uncalled capital by extinguishing or reducing the liability of the shareholders ⁴.

The new Swiss Companies Act came into force on 1st July, 1937 ⁵. The Swiss Code remained, though there were important modifications, in its former style ⁶. The leitmotif of these modifications was the protection of the shareholder, and, especially, perhaps, the small shareholder. In the middle of the thirties a new element in the form of "protection of enterprise" ⁷ started to rise to the surface, and, although far from being as

1. Cuenet, p. 14.

2. Ibid., p.56.

3. E.Müller, op.cit., p.5 and note 1.

4. Cuenet, pp. 57 ff.

5. Cf. the Federal Law dated 18th December, 1936. This Act comprise the third part of the Code des Obligations (§§ 552-926). It is quoted in this study from its French text. Cf. C., J. and A. Rossel, Code Civil Suisse et Code Federal des Obligations, 6th ed., Lausanne 1943.

There is a vast literature on the Swiss Company Law of 1937. Cf. e.g. : F.W.Bürgi, "Die Aktiengesellschaft", in : "Das Obligationenrecht" (ed. by Bürgi, Egger, Gutzwiller and others), part 5b, Zurich 1947/53 ; A. Siegwart, "Die Aktiengesellschaft", in : "Das Obligationenrecht" (ed. by Bürgi etc.), part 5a, Zurich 1945 ; T. Guhl, Das Schweizerische Obligationenrecht, Zurich 1944 ; J. de Steiger, Le droit des sociétés anonymes en Suisse, Lausanne 1950.

6. E. Bossard, Die Reserven der Aktiengesellschaft im neuen Obligationenrecht, Berne 1940, p.59.

7. G. : "Unternehmensschutz".

accentuated as in the legislative acts of totalitarian countries, it left its traces on all regulations about the protection of shareholders. Further developing the trends so well known in Article First of the Swiss Civil Code, this stress on his protectable interests enhanced the status of the shareholder into what might be called a "faithful entrepreneur of his company". It may seem at first glance that this was a retrograde step towards the rather "personal" relations of a partnership. A more close scrutiny, however, reveals that the shareholder is in no way transformed into an actual entrepreneur, but that the quality of a "faithful entrepreneur" is applied to him quoad the interests he may claim as protectable. Thus, only those of his interests would continue to be protectable (in the case, let us say, of a prospective alteration of capital) which would be his interests if he was considered as a "faithful entrepreneur". The result is a double-headed regulation ; the protection has to serve two aims at the same time : to protect the small shareholder from actions of the "ruling and governing shareholders" on the one side, and to protect the whole community of shareholders by elevating the "enterprise" as the central and chief object of protection on the other side.

One of the most favoured means of this protection of the enterprise were the regulations about an obligatory creation of reserves ¹. Concerning alteration of capital, however, this would work out a rule of inter-

1. This idea was formerly known in German and Italian Law.

pretation in cases where a shareholder claimed that a proposed alteration would harm his individual rights, his "acquired" rights, or his special interests. Thus, in the light of this recent development of Swiss Law, a shareholder would be able to insist on the harmfulness of an intended alteration of capital when the interests presumably affected by the alteration are such interests as a shareholder "qua faithful entrepreneur" or partner would have had. The aim of this regulation is to limit any selfish victory of private individual interests over those of the enterprise ¹.

A few very laconically ² expressed sections of the new Swiss Companies Act are devoted to the question of increase by issuing new shares ³; the following three sections ⁴ deal with the issue of preference shares. These regulations on increase are to be found among the sections of the First Chapter ⁵ of the Companies Act, merely as the third and fourth subdivision of the 11th, or "L", division of the First Chapter. This eleventh division has an unusual heading: "The Protection of Shareholders and of the Share-capital" ⁶. Its second subdivision is on "alteration of the charter", the third on "issue of new shares", and the fourth on "issue of preference

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1. E. Bossard, Die Reserven der Aktiengesellschaft im neuen Obligationenrecht, Berne 1940, p. 61.
 2. A sketch on the laconic style of the Swiss Companies Act of 1937, as far as it concerned the provisions on alteration of capital, was made by A. Wieland ("Kritisches zum Kapitel der Grundkapitalveränderungen nach dem neuen Aktienrecht", in: ZSR, vol. 57, Basle 1938, pp. 46 ff.). A critique of the system of the provisions of the Swiss Companies Act was made also by Scherrer (p. 40 and passim).
 3. CO §§ 650-653. Cf. Scherrer, p. 40.
 4. CO §§ 654-656.
 5. SF: "Chapitre Premier", SG: "Erster Abschnitt".
 6. SF: "Protection des actionnaires et du capital social", SG: "Schutz der Aktionäre und des Grundkapitals". Cf. Scherrer, p. 40 and note 5.

shares". These are the main causes materiae of the Swiss Companies Act of 1937 on increase of capital ¹.

An increase of capital by increasing the nominal value of the shares is now considered valid, since the provision of the former (1881) section 614 (2) has now been abolished ². It is, however, still questionable whether and in what cases a higher majority or quorum (and, perhaps, even the unanimous decision of all the shareholders) is required ³. This leaves the way open for an increase by capitalization of the reserves and surpluses, and by issuing gratis shares ⁴, things that were almost if not quite inconceivable under older Swiss Law ⁵. An alteration of the nominal value of the shares can, besides, be effected by an accumulation or consolidation of smaller shares into one bigger one, or by splitting up of a bigger share into several smaller ones ⁶. A consolidation becomes imperative when the

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1. Lit.: W.Scherrer, "Die Kapitalerhöhung bei der Aktiengesellschaft", in : "Festgabe der Basler Juristenfakultät zum schweizerischen Juristentag", Basle 1942 ; H.W.Schmid, Die Erhöhung des Grundkapitals bei der Aktiengesellschaft, (typewritten thesis) Basle 1938 ; A.Wieland, "Kritisches zum Kapitel der Grundkapitalveränderungen nach dem neuen Aktienrecht", in : ZSR , vol.57, Basle 1938, pp. 1-50.
 2. Rauch, vol.I, p. 69 and note 3 ; Scherrer, p.41 ; E.Schucany, Kommentar zum schweizerischen Aktiengesetz, Zurich 1940, p.65 ; A.Siegwart , p.163, pp.180 ff.; pp.384 ff.
 3. Scherrer, p. 69.
 4. E.Bossard, op.cit., p.174 ; F.W.Bürgi, pp.115 and 128 ; F.Reyrenn, "L'incorporation des reserves au capital social et le problème de l' imposition des actions gratuites en Suisse", in : "Melanges d'études offerts à Folliet et Hensch", Geneva 1945 ; Scherrer, pp. 44 ff.; pp.49 ff.; pp.59 ff.; p. 68, and pp.72 ff.; J.Senarclens, Les reserves des sociétés anonymes, Geneva 1943 ; Siegwart, pp.380 ff.; Steiger, pp.292-293 ; G.M.Wettstein, Die nicht voll eingezahlte Aktie, Aarau 1948, p.46.
 5. Buechler, p.23 ; Rauch, vol.I, pp.70 ff.
 6. It is curious to note that such an accumulation requires the sanction of the shareholders whose shares are to be consolidated (CO § 623,II), but not a splitting up. Cf. G.M.Wettstein , op.cit., p.14.

nominal value of shares slides below the legal minimum ¹. The possibility of an increase of capital that would be partly an increase by issue of new shares, and partly by increasing the nominal value of the shares, is quite conceivable in Swiss Company Law ².

The analogy between the formation of a company and an increase of capital is still followed in the Act ³, though for at least twenty years previously legal opinion had regarded the analogy as inept ⁴. Thus, similar to the procedure for company formation, the provisions on successive formation (CO §§ 629-637) and on simultaneous promotion ⁵ are equally applicable to the increase of capital too ⁶. As far as increase is concerned, the main difference between successive formation and simultaneous promotion lies in the possibility, in the case of the latter, of doing in one meeting all

1. G.M.Wettstein, op.cit., pp.99 ff. Cf. infra p.203, note 2.

2. Scharrer, p.67.

3. Cf. U.Geilinger, Die erschwerten Beschlüsse der Generalversammlung der Aktionäre, Aarau 1948, p.48 ; Scharrer, pp.54 and 56 ; Steiger, p.294.
See also : CO § 650 (1).

4. The main motive of Swiss jurists in protesting against the use of this analogy was to stress the fact that during the formation of a company the separate legal entity, which it afterwards becomes, is not yet in existence, and, therefore, "the company" cannot be a party to its own formation. But the fact that a company contemplates an increase of capital presupposes that the company as such has been brought into existence and therefore possesses in every respect its own juridical personality, being thus capable of having its own opinion and of playing its own role in all such processes. Cf. Siegwart, p.385.

5. CO § 638. SF : "Fondation simultanée". Though unanimity is required for a simultaneous promotion, this does not apply to an increase of capital by a simultaneous promotion. Cf. U.Geilinger, op.cit., p.86, note 15 ; Steiger, p.295.
Cf. also supra p. 53.

6. U.Geilinger, op.cit., p.86 ; Schucany, p.65 ; Siegwart, p.385.

that usually has to be done as regards successive formation in two general meetings. Thus, in this single meeting everything can be included ; viz : the publication of the prospectus ¹, the subscription to the new shares ², and the payment for these shares ³. The analogy between formation and increase applies also to the provision that at least 20% of the share has to be paid immediately after the subscription ⁴.

The resolution in general meeting on increase of capital has to be treated, as before, as a resolution on alteration of the charter ⁵. The shareholder has neither the irrevocable right ("droit acquis") to demand the maintenance of the previous amount of capital, nor, conversely, is he under any obligation to participate in the increase ⁶. Unlike German and Italian Law, Swiss Company Law does not contain the provision that an increase is only possible after the previous capital has been fully, or almost fully, paid up ⁷. Section 651 specifies the contents of the prospectus. Swiss Company Law provides also for a shortened form of prospectus ⁸, which differs from the standard form not so far as its

1. Scherrer, p.54.

2. A.Brauen, La souscription d'action, Neuchatel 1928.

3. This increase by simultaneous promotion has become now in Swiss practice the normal way of proceeding. Cf. Schucany, p.66 ; Steiger, p.295.

4. G.M.Wettstein, Die nicht voll eingezahlte Aktie, Aarau 1948, pp.46-47.

5. The unalterability of the charter is still much stronger in Swiss Law than in German Law. Swiss Company Law has no provision entitling the administration to "adjust" the charter in minor cases, as is allowed in Germany (AG § 145). Cf. Steiger, p.287.

6. E.Mueller, Kapitalherabsetzung bei der Aktiengesellschaft, Berne 1938, p.11 ; Siegwart, p.148 ; Steiger, pp. 294 and 300.

7. Scherrer, p.65 and note 29 ; Siegwart, p.379 ; Steiger, p.298.

8. SF : "bulletin de souscription", SG : "Zeichnungsschein".

contents are concerned, but in the technical way in which the conditions of subscription are laid out in the document ¹. This also applies, of course, to the procedure concerning increase of capital : a separate formal document, called the "prospectus" is no longer obligatory provided that the contents ² required for such a document are adequately inserted in a less formal document, called "bulletin de souscription" or "Zeichnungsschein" ³. Though the term is not used explicitly, Swiss Company Law recognizes the institution of "authorized capital" ⁴.

Pre-emptive rights are provided for in the Act ⁵. It is admissible for either the charter, or the resolution on increase of capital to contain an arrangement that is different from that provided in the Act ⁶. Thus, pre-emptive rights can be abolished too ⁷, but in the event of the charter mentioning pre-emptive rights expressis verbis (in implement of the statutory provisions of this CO § 652), they could, of course, be abolished or amended only in the way provided for an alteration of the charter, and n o t without the consent of the shareholders ⁸. If the shareholders wish

1. Schucany, p. 36 (3).

2. Only the French text (neither the German, nor the Italian) mentions in the last sentence of CO § 651 that the names of all the promoters ("les noms de tous les fondateurs") should be included in the text of such a "bulletin de souscription". Cf. V.,J.and A.Rossel, Code Civil Suisse et Code Federal des Obligations, Lausanne 1943, part II, p.215, note 1.

3. CO §§ 631 and 651.

4. Lit.: R.von Salis, Das autorisierte Kapital, Zurich 1937 ; Siegwart, pp.385 ff.; Steiger, p.296.

5. CO § 652. Cf.Scherrer, p.54 ; H.W.Schmid, Die Erhöhung des Grundkapitals bei der Aktiengesellschaft ..., Basle 1938,pp40 ff.; Steiger, p.299.

6. This different arrangement, could, of course, attribute these pre-emptive rights to a quite separate circle of persons, even perhaps to non-shareholders. Cf. H.W.Schmid, op.cit., p.43 ; Steiger, p.299.

7. Scherrer, p.55.

8. Schucany, p. 69.

to use their pre-emptive rights ¹, they have to proceed in the usual way, and have to subscribe for the new shares and pay for them ². A shareholder who has not been asked is entitled either to object to the issuing of the new shares, or, in the case where this has already been done and the notice has been filed with the registrar, to claim compensation.

There are no special provisions in Swiss Law about qualified increase ³. The resolution in general meeting on the increase of capital, and the resolution in general meeting stating that the whole procedure has been completed ⁴ have to be filed with the registrar ⁵. The new shares are valid only from the moment of the registration of the completed increase. It is not necessary that the nominal amount of the new shares should be the same as the old ones ⁶. However, a below-par-issue of the new shares is not admissible ⁷. The general meeting is entitled (in the framework of the procedure provided for an alteration of the charter) either to issue the new shares as preference shares, or to convert the already issued ones into

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1. SG : "jeder Aktionär", the Italian text : "ogni azionista". However, the French text has it differently : "chaque associé" (i.e. "every member"), though otherwise the French text generally uses actionnaire for shareholder.
 2. Schucany, p.68.
 3. H.W.Schmid, op.cit., p.49.
 4. As mentioned above (cf. supra pp.196-197), both these resolutions can be put together in one, i.e. expressed uno flatu.
 5. CO § 653 (1).
 6. Scherrer, p.53.
 7. G.M.Wettstein, Die nicht voll eingezahlte Aktie, Aarau 1948, p.35.

preference shares ¹. If, however, there already is a class of preference shares, a new class of preference shares with even higher rights (-compared to those attached to the older class of preference shares -) ² can be created only when a resolution to that effect is passed both in the class meetings of those shareholders of preference shares whose rights might be affected by such a creation, and, also, in the usual way in the general meeting of a l l ³ the shareholders, unless the charter provides otherwise ⁴. S.655 provides for the qualified quorum that is necessary in general meeting to pass the resolutions either creating new shares as preference shares, or converting the existing ones into preference shares. The quorum required in this section is of at least two-thirds. Section 656 (2) indicates that the

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1. Unavoidably, this can concern only a part of the older shares, since otherwise (i.e. if a l l the previous shares had been converted into preference shares) there would be no difference between shares at all. The existence of preference shares is always an indication of a multiformity of shares. An alteration of the contents of the shareholders' rights in a l l the shares could therefore in no circumstances create a "preference". Another possibility, however, is to convert the older shares into preference shares, and also issue new shares which would have the same amount of rights that were hitherto attached to the older ones. Cf. Schucany, pp.70-71 ; Siegwart, p.408 ; Steiger, pp.297 ff.
 2. SF : " ... il ne peut être émis de nouvelles actions qui les primeraient ". The German text has it, however, differently : " ...Vorrechte gegenüber den bereits bestehenden Vorzugsrechten ...". Cf. Schucany, p.71 (4).
 3. SF : " ... d'une assemblée générale de tous les actionnaires " ; SG : " .. sämtliche Aktionäre ". It is questionable, however, whether this is a quorum requirement for such a general meeting. Schucany (p.71) refers to a meeting of a l l the shareholders also in the case of the creation of a new class of preference shares when no higher rights, but only similar or lower rights are contemplated. Therefore, it would seem that there is no need to summon the special class meetings of the preference shareholders.
 4. CO § 654 (2). Cf. T.Guhl, Das schweizerische Obligationenrecht, 3rd ed., p.452 ; Steiger, p. 297.

preferential rights may concern the rights on dividends ¹ (either with or without the right to draw a dividend for the period prior to the creation of these new shares), the right to receive a preferential payment in the event of a winding-up ², and preferential pre-emptive rights in the case of a further increase of capital ³.

The same extreme and welcome economy of expression is found also in the sections of the Swiss Companies Act which are devoted to the question of reduction of capital ⁴, since only four very short sections ⁵ deal with it. They are, besides, the most laconic ones in their way. The placing of these sections is most curious from the point of view of system. Unlike German, Spanish and Swedish Company Law, there is in the Swiss Companies Act no chapter, or, at least, no group of sections, covering together the

1. Cf. also CO § 675.

2. Cf. also CO § 745.

3. Though not mentioned explicitly in this place, Swiss Company Law allows for preference shares where the preferential rights consist only in privileges concerning vote. Cf. CO § 693, and V., J. and A. Rossel, Code Civil Suisse et Code Federal des Obligations, Lausanne 1943, part II, p.216, note 3; Schucany, p.72 and pp.124-125.

A quite different situation arises when the charter adopts the principle that every share, irrespective of its nominal value, has the same amount of voting strength. Thus, shares with a smaller nominal value become, comparatively speaking, preference shares. Cf. Scherrer, p.77.

4. Lit. : E. Bossard, Die Reserven der Aktiengesellschaft im neuen Obligationenrecht, Berne 1940, pp.172 ff.; B. Mosimann, Die Herabsetzung des Grundkapitals bei der Aktiengesellschaft und ihr Einfluss auf die wohl erworbenen Rechte des Aktionärs, Zurich 1938; E. Müller, Kapitalherabsetzung bei der Aktiengesellschaft, Berne 1938; M. Staehelin, "Zur Frage der Sicherstellung bei der Herabsetzung des Aktienkapitals", in : ZSR, vol.57, Basle 1938, pp.234-272; A. Wieland, "Zur Kapitalherabsetzung der Aktiengesellschaft nach dem revidierten Obligationenrecht", in : ZSR, vol.60, Basle 1941, pp.1-38; B. Zingg, Der Gläubigerschutz bei der Herabsetzung des Aktienkapitals, Aarau 1940.

5. CO §§ 732-735.

two main types of alteration - increase and reduction - or treating them side-by-side¹. Similar to Scots and English Law, there is a special chapter on Reduction² - the fourth of the Swiss Companies Act - , while the regulations on increase, as mentioned above³, are tucked away in the middle of the first chapter.

This chapter on reduction contains a comparatively great amount of innovations⁴. In its general outline, features parallel with Scots and English Law, and with later developments in German Company Law, can be observed, especially concerning the protection of creditors⁵. This chapter applies to all cases of reduction, except that of a reduction-cum-increase⁶. A lowering of the ceiling of the authorized capital⁷ without any alteration of the issued capital is considered as being a normal reduction, but a diminution of the reserves is, however, usually not so considered⁸. A reduction of the uncalled capital by extinguishing or reducing the liability of the shareholders is considered as possible⁹, though some doubts are expressed about the validity of extinguishing a liability if it

1. Scherrer, p.40.

2. It is, as a matter of fact, one of the shortest, though not the shortest, of the eight chapters which form together the 26th "title" (CO §§ 620-763) of the Swiss Code of Obligations. As mentioned above (cf. supra p. 191), this 26th "title" is the Swiss Companies Act of 1937. Cf. Scherrer, p.39 and note 1.

3. Cf. supra p. 194.

4. Scherrer, p.39 ; Schucany, p.172 (1).

5. Zingg, pp.42-43.

6. CO § 732 (1). Cf. E.Müller, op.cit., pp. 8 ff.; Scherrer, p.48.

7. Cf. supra p. 106, note 3 ; p. 108 and note 3 ; and p. 175.

8. Steiger, p.302, note 2.

9. G.M.Wettstein , Die nicht voll eingezahlte Aktie, Aarau 1948, p.98 and passim.

concerns uncalled capital out of a qualified formation, or out of a qualified increase ¹. In no case can the capital be reduced below the legal minimum ². This is a provision quite unknown in Scots and English Law, and also in older Swiss Law ³. It seems that under the influence of Swiss jurisprudence the old point of view which considered every reduction as being at least partly perhaps a winding up process was dropped in the Swiss Companies Act of 1937 ⁴, but the decision in general meeting on reduction is still deemed to be a resolution on alteration of the charter unless it is a reduction-cum-increase without any alteration of the sum of the share capital ⁵. Technically, a reduction can be achieved either by diminution of the nominal value of the shares ⁶, or by diminution of the number of shares. There are only two types of reduction provided for in the Act of 1937 ⁷: 1) a reduction of capital in order to rectify a negative balance sheet due to losses ⁸, and 2) a reduction due to other causes.

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1. Alfred Wieland, Die verschleierte Apportgründung in Theorie und Praxis des schweizerischen Aktienrechts, Balse 1949, p.35.
 2. CO §§ 621 and 732 (5). Under the Swiss Companies Act of 1937 the minimum capital of a limited company is constituted at SFr.50,000, and the minimum amount of a share at SFr.100. Prior to 1937, however, there were no legal minimums required. Cf. Siegwart, p.173.
 3. Cf. supra p.178, note 1; p.185, note 3; and p. 192.
 4. E.Müller, Kapitalherabsetzung bei der Aktiengesellschaft, Berne 1938, pp.2 and 72.
 5. Such a reduction-cum-increase can be effected only in the form of an issue of new shares (cf. CO §§ 650-656). See Siegwart, p.382.
 6. Siegwart, p. 182.
 7. Schucany, p. 173.
 8. CO § 735. SF : "Si pour supprimer un excédent passif constaté au bilan et résultant des pertes"; SG : "zum Zwecke der Beseitigung einer durch Verluste entstandenen Unterbilanz". This type of reduction has in Swiss Law one particular feature, namely, the reduction becomes legally effective only with the registration of the reduced capital, and not with the de facto "watering" of the capital assets of the company. Cf. W.Schmid, Das feste Grundkapital der Aktiengesellschaft, Aarau 1948, p.143 and note 5a ; G.M.Wettstein, op.cit., p.97 ; A.Wieland, "Kritisches zum Kapitel der Grundkapitalveränderungen nach dem neuen Aktienrecht", in: ZSR, vol.57 (1938), p.12.

The first of these two types is unthinkable with a repayment, and therefore the procedure of satisfying or securing the creditors is not needed ¹, provided that the amount of reduction is equal to the amount of company losses, or surpasses it only in order to facilitate an equal subdividing of these losses among the shares of the company ². Though it seems that such a reduction is in reality merely an adjustment of the official capital item of the balance sheet to the present actual situation, and, therefore should be regarded as an obligation on the side of the company to readjust the capital accordingly to the proper level ³, a resolution in general meeting is still considered as essential.

The second type of reduction may be with or without repayment ⁴. The first case applies to a reduction in order to bring an unemployment of capital to an end ⁵. Such a reduction may also take the form of extinguishing the shareholders' liability ⁶. The latter case covers reduction by redemption of shares acquired by the company itself ⁷.

An unusual feature of Swiss Company Law is the participation of a neutral body of approved auditors ⁸ in the procedure prior to the formal

1. Steiger, pp.302 ff.

2. Schmid, p.111 ; Schucany, p.177, Zingg, p.44.

3. Cf. supra p. 39.

4. Schucany, p.173.

5. G.M.Wettstein, Die nicht voll eingezahlte Aktie, Aarau 1948, p. 98.

6. Cf. supra p. 202.

7. CO § 659 (1). Cf. A.Wieland, "Die Unvereinbarkeit des Erwerbs eigener Aktien mit dem Einlage-Rückzahlungsverbot", in : ZSR , vol.56, Basle 1937, pp.202-206.

8. CO § 732 (2). SF : "syndicat de revision ou une société fiduciaire", SG : "Revisionsverband oder ... Treuhandgesellschaft". It appears that there exists an officially recognized list of about 35 approved firms of auditors which are entitled to undertake such or similar tasks. Cf. E.Müller, op.cit., p.9 ; Steiger, pp.304-305 ; A.Wieland, "Kritisches zum Kapitel ...", op.cit., pp.16 ff.

resolution in general meeting on reduction of capital. This applies also to the case of a reduction in order to rectify a negative balance sheet ¹. Similar in its oddity is the provision that a representative of the body of auditors has to be present at the general meeting where the question of a reduction of capital is on the agenda ².

A threefold publication in the official gazette is needed ³. Besides, publication in a manner provided for in the charter of the company ⁴ is also required by section 733 ⁵. The opportunity has to be given to all creditors to demand satisfaction or security ⁶ within two months following the third official publication in the official gazette ⁷. This publication is necessary even in those cases where the books of the company do not

1. Schucany, p.173.

2. CO § 732 (2). There is some parallelism between this provision and a suggestion made some time ago (cf. supra p.110) in this country that a nominal share in each company should be held by a special trust in order to have a centralized supervision of all national investments in this type of companies.

3. The official title of this periodical is : SF : "Feuille officielle suisse du commerce"; SG : "Schweizerisches Handelsamtsblatt". Cf. E.Müller, Kapitalherabsetzung bei der Aktiengesellschaft, 1938, p.9 ; G.M.Wettstein, op.cit., p.98.

4. Schucany (p.174) asserts that a threefold publication is obligatory in the non-official paper too. This is not, however, evident from the text of this section.

5. E.Bossard, Die Reserven der Aktiengesellschaft im neuen Obligationenrecht, Berne 1940, p. 172.

6. SF : " ... que les créanciers annoncés ont été désintéressés ou garantis" ; SG : "Befriedigung oder Sicherstellung". There is, unfortunately enough, no strict rule about the method of collecting these securities, as there has been in German Law. Cf. F.Marguerat, Les droits des créanciers d'une société anonyme en cours d'existence, Lausanne 1935 ; Steiger, p.316 ; A.Wieland, "Zur Kapitalherabsetzung der Aktiengesellschaft nach dem revidierten Obligationenrecht", in: ZSR, vol.60, p.12.

7. Presumably the creditors are entitled to notify their claims prior to this "third" publication as well. Any notification by a creditor (even an indirect one) is satisfactory if expressed not later than two months after the third official publication. Cf. Schucany, p. 175 (4).

indicate the existence of any creditors ¹, but it is not necessary when it is a reduction by rectifying a negative balance sheet owing to losses sustained by the company ². Only after the expiry of an induciae ³ of these two months ⁴, and after the satisfying or securing of the creditors, who have notified their claims, can the reduction be executed ⁵, and filed with the registrar ⁶. There are, however, some questions unresolved about the amount of the security due to the creditors. According to the opinion of the majority of Swiss authors ⁷, the creditors are entitled to demand the full amount of the intimated claims, but Müller ⁸ thinks that a proportional security should be considered as sufficient ⁹. Schucany ¹⁰, however, thinks that only those creditors are eligible whose claims existed ¹¹ at the time

1. Schucany, p. 174 (2).

2. CO § 735. Cf. also : E.Müller, op.cit., p.10.

3. Cf. supra p. 143, and p. 175 and note 3.

4. This provision is in its character similar to that in the German Companies Act of 1937. Cf. Schucany, p. 174 (3).

5. SF : " La réduction du capital social ne peut être opérée ..."

SG : " Die Herabsetzung ... darf ... durchgeführt ... werden ."

6. The words "with the registrar" are omitted in the French text of the Act.

7. Schucany, p.177.

8. E.Müller, op.cit., p. 30.

9. I.e. , proportionally of the amount of reduction to the total sum of the capital.

10. Schucany, p. 175 (2).

11. Zingg, pp. 99 ff.

of the first official publication, though there is hardly any legal foundation on which this opinion of his can be maintained. Full satisfaction can only be demanded of those debts which became due before the lapse of the two months' induciae. The other creditors have only a right to ask security ¹. Though the opinion is still prevalent that no reduction should be without full security ², the possibility of an agreement with a number of creditors without full security cannot be completely ruled out. Therefore, either a formal receipt of the creditor saying that he has received the security due to him, or a declaration of acceptance of the proposed reduction by a creditor ³ would serve equally well. An official document on the execution of the reduction has to be prepared ⁴.

1. Schucany , p. 175.

2. Ibid., p. 176 (2b).

3. SG : "Zustimmungserklärung" . Cf. Schucany, p. 176 (3).

4. CO § 734 (end of the first sentence).

7. Italy.

Though the older Italian Law was mainly based upon the Napoleonic Codes ¹, modern Italian Company Law shows an increasing impact of German ² and Swiss Law. The Commercial Code of Sardinia-Piedmont of 1842 was extended to the greater part of Italy in 1865 ³, and then replaced by the Codice di commercio in 1882. A series of amendments concerning Company Law was introduced in 1935 ⁴, but in 1942, quite unexpectedly, a major change in the whole legal system took place. Up till then Italy had belonged to the countries where private law was separated into two codes, the civil and the commercial. A change of the legal system took place, possibly under the influence of Swiss Law, where the division into two codes was unknown and the very notion of commercial law was rudimentary. The whole of company law was now incorporated into the new Codice Civile of 16th March, 1942 ⁵. One has to agree that, considered as new ideas set

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1. The first introduction of the Napoleonic Codes in the various parochial states of Italy took place between 1804 and 1809. Only Sardinia and Sicily remained untouched. The Napoleonic Codes remained in force after 1815 only in Lucca, but, following a second wave of reception, Sicily, Sardinia-Piedmont and two other states promulgated new commercial codes which were mainly based on provisions of the Napoleonic Codes. Cf. Arminjon-Nolde-Wolff, vol.I, pp.141 ff.
 2. A.de Saint Joseph, *Concordance entre les codes civils etrangers et de Code Napoleon*, four vol., Paris 1856, does not cover commercial and company law.
 3. Levy, p. 221 ; Rauch, vol.I, p. 89.
 4. L.Mossa, "Italien", in : "Rechtsvergleichendes Handwörterbuch für Zivil- und Handelsrecht" (ed.by F.Schlegelberger), vol.I, part 1, Berlin 1927, p.104.
 5. Rauch, vol.I, pp. 89 ff., vol.II, pp.190-191.
 6. Following some ideas of Fascist origin, Company Law was at first (1941) incorporated into the Libro del lavoro, and, then, changing the numeration of the sections only, into the Codice Civile. Cf. Rauch, vol.I, p.92, note 2.

down in the form of a new system, this reform was a distinct achievement, and it can also be said that this reform was conducted to stress the dominant role of the planning state. The leading class of public companies, it should be noted, was to be supervised and conducted in a special way ¹.

The older Italian Company Law ² was mainly based on French Law. A system of "concessions" applied equally to companies with a capital of over 5 million lire, and to all increases above this level ³, unless the amount of increase was less than a quarter of the former capital and the company was formed more than two years prior to that. As in Scots and English Law, there were no provisions about the minimum amount of capital and shares. On the other hand, there remained the quite antiquated provision that the value of all shares should be equal ⁴. A quorum of three quarters, and a majority of half of the represented capital was required for any amendment of the charter, or increase, or reduction, or reintegration of the capital ⁵.

1. Cf. supra pp. 34-36. See also : Arminjon-Nolde-Wolff, vol.I, pp.144-145 ; Rauch, vol.II, p.36.

2. Lit.: F.Bing, *La societ  anonyme en Italie*, Paris 1887 ; A. de Gregorio, *Della societ  e delle associazioni commerciali*, Turin 1938 ; L.Mossa, *Diritto Commerciale*, vol.I, Milan 1937, pp.171 ff.; V.Salandra, *Societ  commerciali*, Turin 1938 ; C.Vivante, *Trattato di diritto commerciale*, Turin 1893.

3. Hamburger, p. 97 . This amount of 5 million lire was later (in 1935) reduced to one million. Owing to this reduction of the nominal amount requiring a concession, there was, of course, a resultant increase in the number of cases where the "supervision" of the investment market became necessary.

4. L.Mossa, op.cit., p. 194. A similar rule was provided in Latvian Law. Though there was no provision in Italian Law admitting or rejecting "no-par-value"-shares, it could be deduced that since the principle of the fixity of the capital was provided for, and since the number of shares had to be mentioned too, there was practically no place for such type of shares.

5. Codice di Commercio, 1882, Art. 158, part 1 (4)(5). Cf. Rauch, vol.I, p.87.

An unusual provision was that in the case of an increase the absent and dissenting shareholders were entitled to leave the company ¹, receiving the value of their shares in proportion to the assets of the company as shown in the last balance sheet prior to the increase ². This right was abolished in 1935 ³. An increase of capital could be effected either by issuing new shares, or by increasing the nominal amount of all shares equally ⁴. Italian jurisprudence recognized even then that an increase could be effected by a transfer of the reserves or other funds, or by a revaluation⁵, and this type of increase had received the special name of "internal increase" ⁶. As in German, Swedish and Swiss Law, it was quite usual in Italy too to issue fractional scrip certificates ⁷ where an issue of gratis shares was impossible on the basis of an exchange of an equal amount of new shares against old ones ⁸. In the case of a reduction an induciae of three months was provided for ⁹.

1. It. : Diritto di recesso.

2. Art. 158 (2).

3. Rauch, vol.I, p.87, note 2. Cf. infra pp. 243-244.

4. L.Mossa, op.cit., p.214.

5. It. : "rivalutazione".

6. Rauch, vol.I, pp.86-87, and p.88, note 4 ; A.Teofilato, "Aumenti interni di capitale nelle società anonime", in : "Giurisprudenza e dottrina bancaria", vol.13 (1941), pp. 269 ff.

7. It. : "buoni frazionari".

8. Cf. supra p. 177, and infra pp. 258 and 260.

9. Hamburger, pp. 98-99.

The new Codice Civile in its provisions on company law ¹ follows a clear laconic style which is reminiscent of the text of the Swiss Code. Less than a dozen very short sections are devoted to the question of alteration of capital, seven of them dealing with increase, and only three with reduction. An issue of new shares can be made only when the previous capital is wholly paid up ². Subscription to the increased capital, and payment of at least three tenths of the nominal amount of the subscribed shares is the normal mode of procedure. The French principle of "souscription integrale" ³ is still followed, i.e. the shareholders are not bound by their subscriptions when the projected amount has not been reached, but the resolution on increase may bear a different provision ⁴. Qualified increase is mentioned shortly; a special clause on "increase of capital by means of a transfer of credit" refers simply to the appropriate article where a qualified formation by way of a transfer of a credit is dealt with ⁵. The provisions on pre-emptive rights ⁶ are comparatively more detailed. Italian Law provides for the proportional right of the shareholders to acquire the new shares. Legally this is rather an obligation on the side of the company to offer these shares ⁷. The shareholders are entitled to

1. Lit.: A.Brunetti, *Trattato del diritto della società*, vol.II, Milan 1948, pp.514 ff; A.Graziani, *Diritto delle società*, Naples 1952, pp.210 ff.; G.C.Frè, *Commentario delle codice civile* (a cura di A.Scialoja e G.Branca), Rome 1951, pp.574-595; G.Luther, "Die Neugestaltung des italienischen Privat- und Wirtschaftsrechts", in: "Zeitschrift f.ausl.und Internationales Privatrecht", vol.13, Berlin 1942, pp. 638-645..

2. Art. 2438.

3. It. : " ... è integralmente sottoscritto ... "

4. Art. 2439.

5. It. : " ... mediante conferimento di crediti ... "

6. It. : "Diritto di opzione".

7. It. : " devono essere offerte in opzione".

acquire these shares within a period of not less than fifteen days after the appropriate publication in the official gazette ¹. These pre-emptive rights do not apply to cases of a qualified increase ², and can, besides, be excluded or limited by an appropriate resolution, provided only that members ³ representing more than half of the total capital have voted in favour of the restriction or abolition ⁴. An increase of capital by transfer of reserves or special funds in order to issue gratis shares, or in order to increase the nominal amount of the shares already issued is provided for ⁵. As in German Law, provision is made for only a very restricted form of authorized capital ⁶, set in the form of a delegation of the power to increase to the board of directors. This delegation has to be used within one year's time and within a previously fixed amount ; and it can be expressed either in the original charter, or in any later resolution on the amendment of the charter. The rules about the registration of the resolution on increase are more or less on similar lines with those in German and Swiss Law ⁷. There is a strict difference in procedure in the reduction

1. Art. 2441.

2. This exception has some parallel in American Law. Cf. infra p. 233, note 3, and p. 235, note 2.

3. Italian Law uses both expressions : "shareholders" ("azionisti") and "members" ("soci") without paying overmuch attention to a possible difference. On a similar inconsistency in Swiss Law see supra p. 199, note 1.

4. It is stressed in this section that the same majority is also applicable in the case where the resolution has been passed in a "second" meeting.

5. Art. 2442. Gratis shares should not be issued as a new type of priority or preference shares. Cf. Rauch, vol.I, p. 92.

6. Art. 2443.

7. Art. 2444.

of the "exuberant capital" ¹, and the lost capital ².

An induciae of three months is provided only for the first case.

Theoretically, a resolution on reduction of such exuberant capital could be passed only if not one creditor had opposed it, but in practice the decision of the Court may overrule any opposition of creditors, provided only that the company can give an efficient guarantee ³. Unlike other systems of law, Italian Law requires a loss of one third of the capital before the company is obliged to convene a general meeting in order to check its financial situation, and to reduce ⁴ the capital accordingly ⁵. Unlike Scots and English Law, the new Italian Law provides for a special minimum amount of capital. A reduction below this minimum is possible only in the case of a simultaneous increase which would at least bring the capital back to the level of the minimum ⁶.

1. It. : " ... capitale esuberante ..."

2. Art. 2446.

3. It. : " ... idonea garanzia".

4. It. : " ... ridurre ..."

5. It is curious to note that so long as one speaks about a factual loss of capital the Italian Law uses the expression "diminution" ("capitale è diminuito"), but as soon as the official resolution has been passed - "reduction" ("riduzione" or "ridurre").

6. Art. 2447.

8. United States of America.

It is as yet quite impossible to speak in terms of a completed unification of American Company Law, though there have recently been considerable efforts to achieve such unification¹. The draft of the Model Business Corporation Act, which was a result of studies undertaken by the Corporation Law Committee of the American Bar Association and was adopted in 1951, has, perhaps, been the latest of these attempts². At present every state has its own legislation and its own jurisprudence, as it always has had, and therefore the richness of material and the number of varieties is enormous. Indeed, it is not even possible to find unification within the basic terminology. The term "private corporation" covers all that we understand by "limited companies" in Britain³. The words "share" and "shareholder" are sometimes but not always replaced by "stock" and "stockholder". Instead of "memorandum of association" and "articles of association" the American terms "articles ..." or "certificates of

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1. Cf. H.W.Ballantine, "Problems in drafting a Modern Corporation Law", in : "American Bar Association Journal", vol.17 (1931), pp.579 ff.; E.M.Dodd, "Federal Corporation Act, Preliminary Draft prepared by the Corporation Law Committee of the American Bar Association", in : YLJ, vol.53 (1944), pp.812-818 ; Levy, pp.205 and 707; F.A.Wright, "Current developments in statutory corporation law", in : "Miami Law Quarterly", vol.7 (1952), pp.1-43.
 2. The report by G.S.Hills ("Model Corporation Law", in : HLR, vol.48, pp.1334-1380) is not quite up to date on this subject, though correct in the general outline. There existed prior to that a "Tentative Draft", published by the National Conference of the Commissioners on Uniform State Law in 1928. The corporation laws of Idaho, Kentucky, Louisiana and Washington were substantially based upon this model of a Business Corporation Act.
 3. On the reasons why one should still talk about "company law"⁶ instead of "corporation law" in England, see : L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in : HLR, vol.69 (1956), pp.1371-1372.

incorporation" and "by-law" are respectively used, though the connotation of these terms is by no means identical ¹. The term "capital" usually refers to that portion of the assets which has been received as, or allocated to, payment of shares, whereas "capital stock" is used to refer to the book-keeping item carried on the liability side for the purpose of determining whether there is a surplus or a deficit ². Nonetheless, it is as yet almost impossible to speak about a standard nomenclature in American Company Law.

Unlike the majority of European legal systems, the background of American Company Law was common law. This is still so, and in some questions to an even greater extent than in Scots and English Law. Even in those few states where a general reception of common law principles did not take place, as e.g. in Louisiana ³, common law is nonetheless applicable concerning company law questions. Modified principles of partnership are still central ⁴ to private corporation law, though the modern development of the statute law of various states and the practice adopted by the

1. Cf. infra p. 223, note 7.

2. R.S.Stevens, Handbook on the law of Private Corporations, 2nd ed., St.Paul 1949, p.431.

3. Hamburger, p. 120.

4. "A partnership conducted wholly by agents where the co-partners have power to appoint the agents, but are not responsible for their acts". Cf. Dodd-Baker, p.891 ; E.M.Dodd, "Partnership liability of stockholders in defective corporations", in : HLR, vol.40 (1927), p.521, and a contrary point of view by C.Magruder, "A note on partnership liability of stockholders in defective corporations", in : HLR, vol.40 (1927), pp.733 ff.; and K.K.Luce, "Legislative amendment of corporation statutes - the Wisconsin problem", in : "Marquette Law Review", vol.30 (1946), p.24.

majority of companies in the form of their "articles" and "by-laws" are more or less on lines similar to those in this country. Their practice is in many cases even more "modern" and "advanced" than what is found here. The gaps are, however, still filled with principles deeply rooted in common law. A special doctrine was defined during the time of Chief Justice Marshall, namely, that "although the artificial being, the corporation aggregate, was not a citizen", it was nevertheless entitled to sue in the courts of the United States ¹. Much later a bill was even introduced providing that a corporation should be considered a citizen of a state ².

The vast amount of state statute law is the reason why a separate branch of Comparative Law is entirely and exclusively devoted to the comparative study of the different laws of the United States of America ³. Diversity

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1. R.M.Benjamin, "Corporate Citizenship a Legal Fiction", in : "Albany Law Journal", vol.69 (1908), p. 264.
 2. J.J.Parker, "The Federal Judiciary", in : " American Bar Association Journal", vol.24 (1938), pp.239-240.
 3. The leading American periodical on Inter-American Comparative Law is : "Tulane Law Review" (New Orleans, 1925 ff.). Among the scores of American legal periodicals there should also be mentioned : American Bar Association Journal (vol.1-6, Baltimore 1915 ff., vol.6 ff., Chicago 1920 ff.), American Journal of Comparative Law (Baltimore 1952 ff.), American Journal of Comparative Legislation (Ann Arbor), American Journal of International Law (Washington, D.C.), American Law Review (St.Louis 1866 ff.), Boston Law Review (Boston 1921 ff.), California Law Review (Berkeley 1912 ff.), Columbia Law Review (New York 1901 ff.), Comparative Law Series (Washington, D.C., 1938 ff.), Cornell Law Quarterly (Ithaca 1915 ff.), George Washington Law Review (Harrisburg 1932 ff.), Harvard Law Review (Cambridge, Mass., 1887 ff.), Idaho Law Journal (Moscow, Idaho 1931 ff.), Louisiana Law Review (Baton Rouge 1939 ff.), Marquette Law Review (Milwaukee 1917 ff.), Michigan Law Review (Ann Arbor 1904 ff.), New York University Law Quarterly Review (New York 1924 ff.), Temple Law Quarterly (Philadelphia 1927 ff.), University of Pennsylvania Law Review (1851 ff.), Yale Law Journal (Newhaven 1892 ff.).

in details is infinite, and it would be completely impossible to consider the law of all the American states in this study ¹.

Prior to the War of Independence only a few charters had been issued. Corporations as a type of business organizations were then universally unpopular, partly as the result of some antecedents of the American Revolution. Only after the assumption by the legislatures of the power to grant charters ² did this uneasiness gradually disappear ³. Prior to the introduction of the general corporation acts in the different states ⁴, a charter was granted by an individual legislative act of the state. Therefore a legislative act amending the charter had to be passed every time a change was desired. The celebrated Dartmouth College case in 1819 established that the charter granted to a private corporation constituted a contract

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1. A list of the best known corporation acts of the various states is attached hereafter as Annex III. Cf. infra A 24.
I would like to stress in this connection that I selected the company law of seven states for a more detailed study, i.e. California, Indiana, Michigan, New York, Pennsylvania, Washington and Wisconsin. I regret being unable to quote the new Ohio General Corporation Law of October 1955, which, I think, is the latest enactment in American Company Law.
Cf. F.D.Emerson, "The new Ohio General Corporation Law", in : "University of Cincinnati Law Review", vol.24, Cincinnati 1955, pp.463-518.
 2. The states of Pennsylvania and Vermont were probably the first ones where this principle was explicitly assumed.
 3. Joseph S.Davis, Essays in the earlier history of American Corporations, two vol., 1917 ; W.R.Compton, "Early History of Stock Ownership by Corporations", in : "George Washington Law Review", vol.9, Harrisburg, Pa., 1940, pp.125 ff.; E.M.Dodd, "The first half century of Statutory Regulations of Business Corporations," in : "Harvard Law Essays", Cambridge, Mass., 1934, pp.65-132 ; E.M.Dodd, "Statutory developments in Business Corporation Law 1886-1936", in : HLR, vol.50 (1936), pp.27-59 ; C.S.Lobingier, "The natural history of the private artificial person", in : TLR, vol.13 (1938), pp.41 ff.; S.Williston, "History of the Law of Business Corporations before 1800", in : HLR, vol.2 (1888), pp.105-166.
 4. It is generally accepted that an Act adopted by North Carolina in 1795 was the first American general companies act, embodying the principle of "free" formation of corporations, though it did not apply to all types.

between the state and the corporation, and that it was within the protection of the constitutional mandate that no state should pass any law impairing the obligations of these contracts ¹. The opinion was expressed at that time that any legislation changing such a charter "impaired" the obligations existing among the shareholders, and that therefore any such act should be regarded as unconstitutional ². This very strict point of view continued to prevail in some of the states ³ up till the late thirties ⁴, but experience has tended to show that this point of view was damaging the shareholders' interests. This was the reason why powers were gradually introduced in various corporation acts permitting amendment of the charter under specified circumstances ⁵. Thus, an alteration of the charter could be achieved by these three different

1. As recently as 1921, the Louisiana Supreme Court followed the principles involved in the Dartmouth College case, and definitely held that Art.447 of the Civil Code of 1870 does not give the legislature authority to amend corporate charters. Cf. D.E.Bennett, "Remodeling, Merger and Dissolution of Louisiana Corporations, A critical survey", in : "Louisiana Law Review", vol.3 (1941), pp.492 ; K.K.Luce, "Legislative Amendment of Corporation Statutes - the Wisconsin problem", in : "Marquette Law Review", vol.30 (1946), pp. 32-33.

2. Berle-Means, pp. 148 and 209 ; A.C.Becht, "Corporate Charter Amendments : issues of prior stock and the alteration of dividend rates", in : CLR , vol.50 (1950), p.903.

A charter was initially conceived as a contract between the state and the corporation and, once made, the state could not constitutionally "impair the obligation" of such a contract, unless the contract reserved to the state the power to change, to amend or to repeal such a charter. On the notion of "constitutionality" in Scots and English Law see supra p. 27 and p. 50, note 2.

3. E.g. Georgia, New Jersey, Utah.

4. E.O.Curran, "Minority Stockholders and the Amendment of Corporate Charters", in : "Michigan Law Review", vol.32 (1934), p.747.

5. Berle-Means , p. 211.

- methods only : 1. by direct legislation,¹
2. by vote or decision of the company, if authorized by legislation enacted after the formation of the company, or
3. by vote or decision of the company, if authorized by the state's corporation act and the charter².

Gradually, the system of charters granted for individual companies was replaced by general corporation acts, at first for certain classes of companies, as e.g. in North Carolina in 1795, and in Massachusetts in 1799, and only later applied for all types of companies. For some forty years both systems often existed side by side. Though the Federal Constitution did not provide for company law, it was recognized, after the constitutionality of two federal companies was contested in the eighteen-twenties, that by virtue of the doctrine of implied powers a granting of charters by the Federal Congress was valid. Nevertheless, the limits of this power of the Federal Congress are still not quite clear³.

The legislation of some of the states has shown an exaggerated amount of liberality in matters of company law⁴. This and the laxity⁵ regarding the

1. This power of the states to interfere with the internal business of companies is at present largely dormant, but this latent possibility may one day become a main issue in American Company Law. Cf. Berle-Means, p.210 ; K.K.Luce, op.cit., p.32.

2. Berle-Means, p. 208.

3. Levy, p. 152.

4. New Jersey and Delaware were and still are referred to as classic examples of states with an extremely liberal attitude towards the formation of new companies and laxity in failing to provide important safeguards against all kind of abuses. Lit.: T.Conynnton, Organization and Management of Corporations, with special reference to the laws of New York, New Jersey, Delaware and West Virginia, New York 1900; C.C.Kee- dy, Delaware Corporation Law and Equity Practice, New York 1931; R.C.Larcom, The Delaware Corporations, Baltimore 1937; J.H.Colmann and J.F.Finn, "Comparison of Business Corporation Law of Minnesota and Delaware", in : "Minnesota Law Review", vol.22 (1938), pp.661-675 ; L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in : HLR, vol.69 (1956), p.1377 ; V.W.Westrup, "A comparative study of the Corporation Laws of New Jersey, Delaware, Maryland and New York", in : "New York University Law Quarterly Review", vol.11 (1934), pp. 348 ff.

5. L.C.B.Gower, op.cit., pp. 1377 and 1389,

incorporation of companies ¹, especially of holding companies ², were, of course, accessory to the great collapse of September and October 1929. Partly as the result of this financial crisis, and in the framework of the New Deal company legislation of the thirties, state supervision was introduced concerning all larger companies ³, and a special Securities and Exchange Commission, usually called S.E.C., was set up, invested with far-reaching powers ⁴. This Commission could even require the presentation of balance sheets, of profit-and-loss accounts, the drawing up of various other "consolidated" accounts, and, also, the production of annual returns. Further, it could censor prospectuses, and even scripts of radio broadcasts undertaken in connection with an appeal to the public. Though this legislation did not apply to all American companies ⁵, it implicitly created a class of companies that had many traits in common with what we call "public companies". Inter alia, this legislation provided for the registration of companies in one of the National Stock Exchanges, and in one of the National Securities Exchanges. Thus, transactions of business

1. Levy, p. 188.

2. Cf. supra p. 149.

3. Levy, pp. 190 ff.

4. H.W.Ballantine, "Problems in drafting a Modern Corporation Law", in: The American Bar Association Journal, vol.17 (1931), pp.579 ff.; M.S.Culp, "Creation of Government Corporations by the National Government", in: "Michigan Law Review", vol.33 (1935), pp. 473 ff.; E.M.Dodd, Jr., "The Modern Corporation Private Property and recent federal legislation", in: HLR, vol.54 (1941), pp.917-948 (cf. especially pp.931 f.); F.Kessler, "Die neueste Gesetzgebung und Rechtssprechung auf dem Gebiete des nord-amerikanischen Aktienrechts", in: ZsAIP, vol.6 (1932), pp.926-953; J.P.Loeb, "Revision of the Corporation Laws of California", in: "American Bar Association Journal", vol.19 (1933), pp.679 ff.; F.E.Schmey, "Aktuelle Probleme des amerikanischen Aktienrechts", in: ZHR, vol.96 (1931), pp.129 ff.

5. E.g. it did not apply to companies which operated or traded within one single state only.

in non-registered securities were treated somehow as "less important" and were sometimes even declared unlawful. It is curious to note that one of the main aims of this legislation was protection of shareholders as investors, and of the shareholders against the various possible underhand manipulations of the managers and directors. In doing so, stress was laid upon their position as investors, and not as members of the company ¹.

The practical value of the work of the S.E.C. was in respect of new issues, especially in the introduction of a scrutiny of projected increases of capital, of the par-value of the new shares ², and of the issue of no-par-value shares. It is worth while noting that this S.E.C. was in principle against various manipulations which lead to a suppression or limitation of pre-emptive rights.

Though the provisions regarding amendment of the charter vary from state to state, and the scope of the power is peculiar to each jurisdiction, ³ the present position of American Company Law ⁴ concerning alteration of

1. Cf. supra pp. 21 ff.

2. Levy, pp. 197-198.

3. K.K.Luce, "Legislative Amendment of Corporation Statutes - the Wisconsin problem", in : "Marquette Law Review", vol.30 (1946), p.27.

4. Lit.: C.C.Abbott, The rise of the business corporation, Ann Arbor 1936 ; F.M.Anderson, American and Foreign Commercial Law, Washington 1939 ; H.W.Ballantine, On Corporations, Chicago 1946 ; C.F.Bostwick, Legislative Competition for Corporate Capital, Albany 1899 ; N.S.Buchanan, The Economics of Corporate Enterprise, New York 1940 ; J.Commons, Legal foundations of capitalism, New York 1924 ; W.W.Cook, The principles of Corporation Law, Ann Arbor 1925 ; A.S.Dewing, Financial policy of corporations, New York 1935 ; E.M.Dodd and R.J.Baker, Cases and Materials on Corporations, Brooklyn 1951 ; A.A.Kuhn, A Comparative Study of the law of Corporations, New York 1935 ; A.W.Machen, A treatise on the modern Law of Corporations, Boston 1908 ; V.Morawetz, A treatise on the Law of Private Corporations, Boston 1886 ; P.O'Leary, Corporate Enterprise in Modern Economic Life, New York 1933 ; R.B.Schlesinger, Comparative Law, Cases and Materials, Brooklyn 1950 ; H.O.Taylor, A treatise on the law of Private Corporations, Philadelphia 1884 ; S.D.Thompson, Commentaries on the law of Private Corporations, San Francisco 1895/1899 ; I.M.Wormser and J.A.Crane, Cases and other materials on Private Corporations, St.Louis 1948.

capital¹ can be summarized as follows. It is regarded as essential that in times of rapid industrial and economic change the corporate organizations should have a flexibility which would enable them either to expand in order to incorporate new businesses, or to tighten the financial belt if the situation so required. Such financial and structural readjustment was usually very difficult under the old system, where the assent of all the shareholders was required almost every time².

The rule about the unalterability of the charter and the capital fixed therein, generally based on the purely contractual structure of the relations between the state, the company and the shareholders³, is now in practice inapplicable, since there is no longer any state left which does not have some sort of reservation or special authorization explicitly

1. Lit. : H.W.Ballantine, "Stockholders' liability in Minnesota", in : "Minnesota Law Review", vol.7 (1923), pp.79-112 ; H.W.Ballantine, "Changes in California Corporation Laws", in : "California Law Review", vol.17 (1929), pp.529 ff.; A.C.Becht, "Changes in interests of classes of stockholders by corporate charter amendments reducing capital and altering redemption, liquidation and sinking fund provisions", in : "Cornell Law Quarterly", vol.36 (1950), pp.1-50 ; A.C.Becht, "Corporate Charter Amendments, issues of prior stock and alteration of dividend rates", in : CLR, vol.50 (1950), pp.900-944 ; D.E.Bennett, "Remodeling, Merger and Dissolution of Louisiana Corporations"; in : "Louisiana Law Review", vol.3 (1941), pp.481 ff.; C.R.Carpenter, "Reduction of capital stock - disposal of the resulting surplus", in : "Texas Law and Legislation" (1947); E.O.Curran, "Minority Stockholders and the amendment of corporate charters", in : "Michigan Law Review", vol.32 (1934), pp.743 ff.; E.C.Lasseigne, "Recapitalization and Reorganization of Corporations under Louisiana Corporation Law", in : TLR, vol.24 (1949), pp.320 ff.; K.C.Mullen, "Stock dividends - eliminating accrued undeclared cumulative dividends by charter amendments", in : "St. John's Law Review", vol.19 (1945), pp.139 ff.; G.W.Wickersham, "The Capital of a Corporation", in : HLR, vol.22 (1909), pp.319 ff.

2. D.E.Bennett, op.cit., p. 481.

3. A.C.Becht, "Corporate Charter Amendments, issues of prior stock and alteration of dividend rates", in : CLR, vol.50, pp.902 ff.

given in its constitution or in the general laws ¹. Many charters give the power of alteration to a majority of shareholders in order to secure in advance the assent of the shareholders to possible alterations ². When, however, the charter has definitely fixed the capital at a certain sum, the company has practically no authority to alter it at all ³, and can therefore neither increase nor reduce the number of its shares, nor alter their nominal value ⁴. It was questionable for a very long time whether it was legal to amend the charter in order to give the majority of the shareholders the power to alter the capital ⁵, and it was decided that authorization to alter the charter, and the capital fixed therein, must be given explicitly by state legislation ⁶, and must be affirmed by the articles ⁷. This is the normal

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1. In former days when shareholders had to face the absence of such provisions, the courts in some states implied a "common-law"-majority power to amend the charter in good faith and for purposes reasonably calculated to meet genuine business development need", although such a power was usually considered as inconsistent with partnership. Cf. E.O.Curran, op.cit., p.744 ; K.K.Luce, "Legislative Amendment of Corporation Statutes - a Wisconsin problem", in : "Marquette Law Review", vol.30 (1946), pp.24-25.
 2. K.K.Luce, op.cit., p.27.
 3. V.Morawetz, A treatise on the Law of Private Corporations, vol.I, p.408, vol.II, p.728.
 4. Berle-Means, pp.211-212 ; Thompson, vol.II, p.1569.
It was held in some of the states (e.g. in Montana, Nebraska, Utah) that an amendment could not affect those shares which were sold as fully paid, non-assessable, or subject to further assessments.
 5. E.O.Curran, op.cit., p. 765.
 6. Some of the state legislations in the nineteenth century possessed restrictive regulations concerning alteration of capital. Other states tried to avoid abnormal increases by providing for a maximum limit fixed. Cf. Thompson, vol.II, pp.1588-1590.
 7. Unlike Scots and English Law, the American "articles" are the main instrument of the company constitution. While these American "Articles" have retained for a much longer period the unalterability of a British "memorandum" (cf. supra p. 73), they do not correspond merely to the "memorandum", but have adopted to a great extent the functions of the British "articles". The American "by-laws" are therefore a much less important instrument of the constitution. Cf. also Berle-Means, p.208.

case now. Usually it is declared in the corporation law of a particular state that a corporation may amend its articles in order :

1. to increase or decrease the authorized number of its shares, of any class, issued or unissued, or the par-value thereof,
2. To increase or decrease the number of shares of one particular series of shares,
3. to change shares having par-value into the same or a different number of shares without par-value ²,
4. to increase or reduce the par-value of shares ¹,
5. to change shares without par-value ² into the same or a different number of shares with or without any par-value,
6. to create classes of par-value shares together with classes of shares without par-value ²,
7. to create classes of shares of different par-value,
8. to restrict, limit, create or enlarge the voting rights of certain classes of shares,
9. to grant to any class or classes of shares pre-emptive rights to subscribe for shares, or
10. to enlarge or restrict or revoke existing pre-emptive rights of any class or classes of shares ³.

1. Pennsylvania was familiar with the provision of a legal maximum for one share of \$ 100 , and in a few states legal minimum figures were provided for. Cf. T.E. Atkinson, "Vereinigte Staaten von Amerika", in : "Rechtsvergl. Handwörterbuch f. Zivil- und Handelsrecht" (ed. by F. Schlegelberger), vol. I, part 2, Berlin 1929, p. 693.

2. Cf. infra p. 228, note 2. See also : Berle-Means, p. 213.

3. Cf. e.g. California, s. 3601, as amended by Statutes of 1949 (c. 997).

This is a quite normal catalogue of all the activities which may come under the heading of alteration of capital. In some states this right of the corporation to amend its articles at any time is linked with the obligation to comply strictly with certain special provisions of the law ; in other states it is declared that such amendments are valid so long as the articles as amended would have been authorized as original articles¹ by the vote of the holders of the majority of its shares entitled to vote, provided only that if any such amendment should change the rights, privileges or preferences of the holders of any class² share, such an amendment must be approved by the vote of the holders of a majority of shares of each class of shares entitled to vote, and a majority of shares of each class whose rights, privileges or preferences are so changed³. Such an authorization may be limited. A limitation by sum may also be a two-sided one : for an increase, and for a reduction⁴. Any increase beyond such an authorization would then, of course , be void⁵.

1. Cf. Indiana, s. 22.

2. Cf. A.C.Becht, "Corporate Charter Amendments, issues of prior stock and alteration of dividend rates", in : CLR, vol.50 (1950), pp.900 ; J.H.Rowell, "Rights of Preferred Shareholders in Excess of Preference", in : " Minnesota Law Review", vol.19 (1935), pp.406-423.

3. Cf. Michigan, s.43.

4. "Corpus Juris Secundum" (ed.by W.Mack and D.J.Kisel),vol.18, Brooklyn 1939, p.740.

5. Any creation of new shares in excess of the authorized amount was considered as prohibited by the rules of common law, and therefore illegal.
Cf. E.O.Curran, "Minority stockholders and the amendment of corporate charters", in: "Michigan Law Review", vol.32 (1934), p.766 ; Levy, p.788 ; V.Morawetz, A treatise on the Law of Private Corporations, vol.II, Boston 1886, p.729.

State legislation generally provides for quorum and majority requisites in general meetings in order to reach valid decisions ¹, and usually they are the same as are required for amendments of the charter ². In a few states a rather peculiar rule exists replacing the requirement of a majority in general meeting simply by the written assent or consent of a certain number of shareholders ³ without meeting at all, and there is a provision in some of them that while a certain majority is sufficient in general meeting, a unanimous consent in writing is needed outside of it ⁴. Other states, however, are more formal concerning the general meetings for decision of these questions. Sometimes only either quorum or majority is required. A few states provide that the proposal of amendment should first come from the board of directors, where a resolution has to be adopted setting forth the proposed amendment and directing that it be submitted to a vote of the shareholders entitled to vote at a meeting (either an annual meeting or a special one).⁵

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1. These provisions are applicable even if the charter provides explicitly that the capital may be "increased from time to time, at the pleasure of the corporation", or any similar general formula. A majority of two thirds is provided for in some of the state statutes (e.g. Louisiana), and also in the Federal Act concerning the capital of national banks.
Cf. A.C.Becht, op.cit., p.907 ; D.E.Bennett, "Remodeling, Merger and Dissolution of Louisiana Corporations : a critical survey", in : "Louisiana Law Review", vol.3 (1941), p.493 ; E.C.Lasseigne, "Recapitalization and Reorganization of Corporations under Louisiana Corporation Law", in : TLR, vol.24 (1949), p. 321 ; Levy, pp.788 ff; V.Morawetz, op.cit., vol.I, p.410 ; Thompson, vol.II, p.1589.
 2. R.S.Stevens, Handbook on the Law of Private Corporations, St.Paul 1949, p.430.
 3. Cf. California, ss. 500, 3632 and 3638.
 4. E.C.Lasseigne, op.cit., p. 320.
 5. Cf. Indiana, s. 23.

In some other states the proposal of amendment may come either from the board, or by petition from the holders of not less than, say, ten percent of the shares entitled to vote ¹. Only in a few states it is provided that this power may be delegated to the board without any restrictions ², since the doctrine that the directors have no authority to amend or alter the charter, or, implicitly, to alter the capital, and that their power is merely to conduct ordinary business transactions has been prevalent almost everywhere ³. Sometimes special regulations are provided about the order of summoning general meetings and about the formal agenda of such meetings.

The general usage is that upon the proposal and adoption of any amendment to the articles special "articles of amendment" shall be executed and filed ⁴, and on their presentation the secretary of state of that particular state may endorse his approval and issue a formal "certificate of amendment" ⁵. The provisions on the contents of the "articles of amendment" vary

1. Cf. Pennsylvania, s.802. In either case, the board of directors shall direct that it be submitted to a vote at a general meeting, either annual or special.

2. E.g. in California (s.1903) only a resolution of the board of directors is needed to direct that the capital should be increased by a transfer of a portion of the surplus to the stated capital account.

3. The institution of "authorized capital", so very much claimed as originating from the United States, was previously called by the Americans themselves : a right to "receive subscriptions to capital stock not filled up".

Cf. Thompson, vol.II, pp.1570-1571 and p.1576.

As a rule the directors are entitled in the framework of such an "authorized capital" to increase the capital only up to the sum mentioned as its limit, but even then the general usage is, however, to ask for the assent of the shareholders, although, legally, such an increase would be binding irrespective of whether or not assent had been given. The trend is now against the provision of such an additional assent, and there are only a few states left where such an assent is still required, as e.g. in Massachusetts (c.156, § 16). Cf. Dodd-Baker, p.887.

4. Cf. e.g. Indiana (s.26), Pennsylvania (s.806), Washington (s. 23.12.070), and Wisconsin (s.53).

5. Cf. e.g. California (s.3670), Indiana (s.27), New York (s.36), Washington (s. 23.12.070).

from state to state ¹.

Some states follow the principle that the previous capital should be fully, or almost fully, paid up prior to an increase, or, even, prior to the very contemplation of an increase. Usually an increase is effected by the issuing of new shares against cash, but an increase by increasing the nominal value of the shares is also quite frequent. Besides, American Law is familiar with the institution of "no-par-value" shares ², and this makes

1. Usually the articles of amendment set forth among other items the number of outstanding shares and a list of those entitled to vote on the amendment, and in the case of multiformity of shares, their division into classes etc.; also the number of votes for and against such an amendment (cf. e.g. Pennsylvania, s. 806, Wisconsin, s. 53); but some states provide for special statements about the shares already authorized and of the change to be made by the amendment (cf. e.g. Indiana, s. 26, c-e).
2. American literature on this question is vast, though, as may be seen from the list appended to this footnote, only a few are recent publications. They were mainly written in the middle twenties of this century, when these problems were new, the material very sparse indeed, and the experience of practice and theory not yet part of the normal American field of debate. Now, however, the trend has distinctly changed, being rather towards low par value, than no par value shares. Besides, the "education" of the investors is a factor that should not be overlooked when one ceases to speak about the risks of this no-par-value practice.
Lit.: N. Powell and J. R. Wildman, *Capital stock without par value*, New York 1928 ; C. W. Wickersham, *A treatise on stock without par value*, Albany 1927 ; H. W. Ballantine, "Non par stock - its use and abuse", in : *"American Law Review"*, vol. 57 (1923); A. A. Berle, "Problems of no par stock", in : *CLR*, vol. 25 (1925); J. C. Bonbright, "The dangers of shares without par value", in : *CLR*, vol. 24 (1924); H. E. Colton, "Par value versus no par value stock", in : *"American Bar Association Journal"*, vol. 7 (1921); W. W. Cook, "Stock without par value", in : *"American Bar Association Journal"*, vol. 7 (1921); F. Dwight, "The par value of stock", in : *YLJ*, vol. 16 (1907); J. E. Goodbar, "No par stock - its nature and use", in : *"Miami Law Quarterly"*, vol. 3 (1948); R. H. Hollen and R. S. Tuthall, "Uses of stock having no par value", in : *"American Bar Association Journal"*, vol. 7 (1921); C. L. Israels, "Problems of par and no par shares: a reappraisal", in : *CLR*, vol. 47 (1947); W. E. Masterson, "Consideration for corporate shares, with special reference to shares without par value", in : *"Idaho Law Journal"*, vol. 2 (1932); W. D. Mitchell, "Capitalization of corporations issuing shares without par value", in : *"American Bar Association Journal"*, vol. 11 (1925); V. Morawetz, "Shares without nominal or par value", in : *HLR*, vol. 26 (1913); W. de V. Pierson, "Stock having no par value", in : *"Illinois Law Review"*, vol. 17 (1922); R. F. Rice and Harno, "Shares with no par value", in : *"Minnesota Law Review"*, vol. 5 (1921); J. L. Weiner, "The amount available for dividends where no par shares have been issued", in : *CLR*, vol. 29 (1929).

the regulations on alteration even more complex¹. There are only two states left (Nebraska and Oklahoma) where no-par-value shares are not permitted². There are three different ways in which the "no-par-value" question is approached in American statutes :

1. they require or permit the mention in a certificate of incorporation of either the minimum sale price per share, or the minimum dollar amount per share that should be included in the calculation of the capital³, or they require :
2. that the total consideration for no-par-value shares should be shown as capital⁴, or
3. that an unlimited authority should be given to the board to designate a part of the consideration as paid up surplus and to allocate to the capital only the remainder of the sum received for no-par-value shares.⁵

Some statutes provide that no company shall increase its capital except in the manner provided by law, and that written notice of the purpose of the general meeting summoned to consider this question shall be given at least

1. I think it is possible to assert that Belgian Law has in respect of "no-par-value" shares followed the American line (cf. supra p. 140). On the recent plan to introduce this institution into British company law see also : L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in HLR review, vol.69 (1956), p.1400.

Cf. also supra p. 80, note 4, and infra p. 284.

2. C.L.Israels, op.cit., p.1279 and note 2.

3. Cf. e.g. Illinois, § 19 ; Michigan, s.450.4 (e); South Dakota, § 11.0401 (3)(a); see also Berle Means, p.255.

4. Cf. e.g. California, s.1900 (b); Florida, § 612.21 ; Indiana, § 1 (h) ; New York § 12 B ; Wisconsin, s.180.14 (2).

5. Cf. e.g. Delaware, § 14 ; Idaho, § 128 ; Louisiana, § 25 ; Maine , § 19 ; Maryland, § 39 ; Nevada, § 1623 ; New Jersey, § 119 (e); Ohio, § 37 ; Rhode Island, § 53 ; Tennessee, § 3735.

Cf. also : H.W.Ballantine, On Corporations, Chicago 1946, p.480 ; and C.L.Israels, op.cit., p.1286 and note 40.

sixty days before the date of the meeting. If such meeting be an annual meeting, such purpose may be included in the normal notice of such annual meeting. The resolution shall be adopted upon receiving the affirmative vote of the holders of at least a majority of the issued shares, unless any class of shares is entitled to vote thereon as a class, in which event the affirmative vote of the majority of the issued shares has to be counted in each class separately where a class is entitled to vote as a class, and, in addition, the affirmative vote of all holders is needed to make this decision valid ¹.

New shares cannot usually be issued at less than their market value, except in the case of an equal distribution of the shares among all the shareholders. The exercise of rights belonging to the shareholders and emanating from the issue of new shares, e.g. voting rights, is very often linked with the requirement that the full amount of the shares has to be paid up. A great amount of learned opinion has been expressed concerning the question of an increase by issuing preference shares ².

1. Cf. e.g. Pennsylvania, s. 309.

2. A.C.Becht, "Corporate Charter Amendments : issues of prior stock and alteration of dividend rates", in : CLR, vol. 50 (1950), pp. 913 ff.; Berle-Means, p. 215 ; E.O. Curran, "Minority Stockholders and Amendment of Corporate Charters", in : "Michigan Law Review", vol. 32 (1934), pp. 768 ff.; H. Goldschmidt, "Die Kreditbeschaffung durch Vorzugsaktien und Schuldverschreibungen nach englisch-amerikanischen Recht", in : G, vol. 67 (1925), pp. 522 ff.; C.M. Hicks, "The rights of non-cumulative preferred stock - a doubtful decision by the United States Supreme Court", in : "Temple Law Quarterly", vol. 5 (1931), pp. 538 ff.

It was held in an early leading case that the general power reserved to alter the charter does not authorize the issue of preference shares. Now it is very seldom that a court holds that an issue of preference shares is a fundamental change requiring the assent of all the shareholders. When such preference shares are issued a special "redemption clause" is frequently inserted, giving the option either to the corporation or to the shareholders, or to both, to redeem, or to demand redemption of these shares. Cf. infra p. 237.

The practice of issuing new shares gratis out of a surplus ¹, and their allocation to former shareholders is also widely followed. It is a live question in American jurisprudence to consider to what extent the "dividende arrearages" can be removed ². An issue of gratis shares is considered as one of the best ways out of the impasse of the illegality of disposing of these accrued dividends. An issue of gratis shares could be made in addition to, or instead of a dividend paid in cash. The American term for it is "to pay stock dividends" ³. When a company declares "stock dividend" in wholly or partly paid up shares, the new shares are paid up in whole or in part out of the profits which belong to the existing shareholders. The majority of states explicitly declare such an action to be an increase of capital ⁴, but there are still some states where the stress is on the payment of dividends, and the question whether it is or is not an increase proper is usually somehow avoided ⁵. Another question is whether surpluses arising from various sources are equally transferable to the capital account. The trend is more and more to treat all kinds of surpluses

1. Cf. e.g. California, s.1903.

2. The board of a company may be interested in removing such arrearages in order to prevent the impairment of the capital, or to increase the credit of the company, or to renew or to increase dividend payments, or to improve the market conditions of the company's securities, or to simplify the capital structure. Cf. E.C.Lasseigne, "Recapitalization and Reorganization of Corporations under Louisiana Corporation Law", in : TLR, vol.24 (1950), p.322.

3. Rauch, vol.I, pp.52 ff., and vol.II, pp.85 ff. and pp.106-107 ; H.Schneider, Die Aktie nach englischem, amerikanischem und französischem Recht, Marburg 1930 ; K.C.Mullen, "Stock dividends - eliminating accrued but undeclared cumulative dividends by charter amendment", in : " St.John's Law Review", vol.19 (1945), pp.139-144.

4. Cf. e.g. California, s.1903 ; Indiana, s.12a.

5. Cf. e.g. Michigan, s.22 ; Washington, s. 23.24.050 ; Wisconsin, ss. 14 (4) and 38 (2)(a).

on the same footing, whereas previously a considerable number of states¹ provided differing restrictions on differing kinds of surpluses. Thus, in some of the states (e.g. in Delaware) the "preferred" dividend accruals were considered as a "vested right", and it was for this reason that it was thought that they could not be wiped out by an amendment of the charter².

Sometimes special rules exist for the case where a shareholder holds less shares than the number which would suffice to give him one more new share³. Qualified increase is usually provided for in American Law. The assent of some public authority is required for increase of capital in some public companies of a particular character, as e.g. railway, electricity, gas or waterwork companies⁴.

American Law is familiar with the institution of pre-emptive rights, and the literature on this question also is vast⁵. In the case where the

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1. E.g. Delaware, Iowa, Kentucky, Minnesota, New Hampshire, New Jersey, Maryland, South Carolina, Tennessee, Vermont and Wisconsin. Cf. Rauch, vol.II, pp.85-86.
 2. D.E.Bennett, "Remodeling, Merger and Dissolution of Louisiana Corporations", in : "Louisiana Law Review", vol.3 (1941), p.495 ; E.C.Lasseigne, op.cit., p.322.
 3. Cf. supra p. 177 and infra p. 258 .
 4. "Corpus Juris Secundum" (ed. by W.Mack and D.J.Kisel), vol.18, Brooklyn 1939, p.748.
 5. Lit.: A.K.Kuhn, A Comparative Study of the Law of Corporations, New York 1935 ; R.S.Stevens, Handbook of the Law of Private Corporations, St.Paul 1949 ; H.S.Drinker "The pre-emptive rights of shareholders to subscribe to new shares", in : HLR, vol. 43 (1930) ; F.Dwight, "The right of stockholders to new stock", in : YLJ, vol.18 (1908) ; A.H.Frey, "Shareholders' pre-emptive rights", in : YLJ, vol.38 (1929) ; G.S.Hills, "Pre-emptive rights of preferred stockholders to subscribe to new stock", in : "New York University Law Quarterly Review", vol.5 (1928), pp.207 ff. ; E.C.Lasseigne, "Recapitalization and Reorganization under Louisiana Corporation Law", in : TLR, vol.24 (1949), pp.320 ff. ; V.Morawetz, "The pre-emptive rights of shareholders", in : HLR, vol.42 (1928), pp.186 ff. ; - I.Lott, Das deutsche, französische, englische und amerikanische Aktienbezugsrecht, Stuttgart 1935 ; and A.P.Sereni, La società per azioni negli Stati Uniti, Milan 1951.

shares are issued for cash ¹, every shareholder has a right of "pre-emption" ² of a fractional part of the new issue ³, in proportion to his share in the company's existing capital. To exercise these rights a reason-

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1. Unless otherwise provided in the articles, pre-emptive rights do not exist where shares are issued for property or considerations other than cash (i.e. in the case of a qualified increase), or where shares are issued in case of a merger, or to satisfy conversion rights, or where shares are issued in payment of debt. Cf. e.g. Michigan, s.31. According to some statutes (e.g. Arkansas, Florida, Idaho, Ohio, Tennessee) pre-emptive rights do not apply to a further increase in an already existing class. Cf. Berle-Means, pp. 145-146, and p. 207 ; Buchanan, p.80 ; Dodd-Baker, pp. 887 and 908 ; and A.H.Frey, op.cit., pp. 563-583. See also infra p. 235, note 2.
 2. The doctrine of "pre-emptive rights" was first promulgated in 1807 in the case of Gray v. Portland Bank (1807, 3 Mass.364), though its history in American Law may be much older, since the expression "pre-emption" itself had already been accepted in America prior to the War of Independence (thus being an early Georgian creation). The opinion was expressed in American theory of law that the institution of pre-emptive rights was based on early partnership conceptions. Cf. also : L.C.B.Gower, "Some Contrasts between British and American Corporation Law", in : HLR, vol.69 (1956), p.1380.
It was originally meant to be only an "equitable" remedy, and not a positive legal right, and even at the beginning of this century this "right" was rather an agreement to enlarge the investments proportionally to the shares held by the shareholders, with a special clause that only upon a failure to take up one's allotment, could it be sold on the market. Cf. Berle-Means, p.144 and pp. 255 ff.; Buchanan, p. 78 and note 11 ; Dodd-Baker, p. 904 ; F.Dwight, op.cit., p. 111 ; G.S.Hills, "Model Corporation Act", in : HLR, vol.48 (1935), p.1357, note 33 ; Levy, pp.701 ff., and pp.795-796 ; V.Morawetz, A treatise on the Law of Private Corporations, vol.I, p.427.
 3. It has been held that these pre-emptive rights do exist where the shares are created by an amendment to the charter, but do not exist in the case of an issue out of a previously authorized capital, since it is understood that the original subscribers took their stock on the implied presumption that the company could complete the sale of this stock (within the framework of the authorized capital) without any obligation to offer it to those who bought one of the previous lots out of the same authorization. An exception to this exception is still possible, however, namely, when the conditions have changed to such an extent that the issue of new shares, though technically out of the old authorization, has nothing in common with the old financial plan. Then, of course, pre-emptive rights exist just as they would exist in a newly authorized stock. Cf. Dodd-Baker, pp. 904-908.

able time to subscribe for the new shares has to be given, though usually it is comparatively short ¹. Some of the statutes are, however, reversing the legal presumptions in this question on lines similar to those we have observed in Scots and English Law ², where a compulsory rule on this question has not been adopted ³. These states provide that, unless otherwise stated in its articles, a company may issue shares, option rights or securities having option rights or conversion rights, without first offering them to shareholders of any class or classes ⁴. Other states, though they have retained this institution, declare that the articles of any company may provide that the shareholders shall have no pre-emptive rights, or may provide such restrictions or limitations on these rights as may be desired ⁵. Again, still other states provide that a company is entitled to cancel its members' pre-emptive rights by a decision in general meeting ⁶, and to distribute the new shares otherwise, even by selling them in open market ⁷.

1. Dodd-Baker, p. 908 ; Thompson, vol.II, p.1585.

2. Cf. supra pp. 77 ff.

3. Cf. L.C.B.Gower, op.cit., p. 1380 , and L.C.B.Gower, "Corporate Control : the battle for Berkeley", in : HLR, vol.68, p. 1179, note 10.
L.C.B.Gower is of the opinion that the doctrine of pre-emptive rights has never been adopted as a compulsory legal rule in Britain. It is submitted, however, that it was known here at the end of the eighteenth century, up to 1862 (cf. supra p.78 and notes 3 and 5), and is still known in the Companies Clauses Consolidation Acts of 1845 (cf. supra p. 66, note 2, and p. 79).

4. Cf. e.g. Indiana, s.6 (i) ; Pennsylvania, s.611. Cf. Buchanan, p.80.

5. Cf. e.g. Colorado, § 2243 ; Illinois, § 24, and § 47 (k) ; Michigan, s.31 ; Montana, § 5905 ; West Virginia, § 6 (i).

6. Some of the states provide that in order to delete from the charter any regulation which gives to shareholders pre-emptive rights, the affirmative vote of the holders of 80% of the shares of each class is required. Cf. Indiana, s.24 (c) and s.25 (b).

7. If, however, shares once issued by a company should have come back into its possession it is usually considered that there is no reason why they should not be sold on the market. Cf. V.Morawetz, op.cit., vol.I, p. 427.

Pre-emptive rights are usually considered as being part of the common law. They belong to the shareholders, it has been said, as an "inherent right by virtue of their being stockholders" ¹. Only quite recently and in certain states were these common law principles replaced by statute law regulations, which, as mentioned, sometimes even provide a complete reversal of the former principle, and where ever possible curtail the facilities to exercise these rights. Legal theory is still in favour of the old principle affirming pre-emptive rights as inherent right of the shareholders, and opposing their exclusion by a decision of a majority or by adopting a charter without them. The courts, on the other hand, are on the whole in favour of all general meeting decisions to curtail pre-emptive rights ².

Unlike French, Belgian and Italian Law, the principle of complete subscription is unknown in American Law ³, and an increase is considered valid irrespective of the amount of subscription, i.e. whether the whole or only a part of the new issue has been taken up ⁴. Usually the shareholders who sign for new shares without qualification are not entitled to rescind or cancel their subscriptions where an incomplete subscription has taken place.

1. Dodd-Baker, p. 892.

2. Courts, notably in Delaware, New Jersey and New York, have assaulted the principle of "pre-emptive rights" from three different sides : 1) asserting that pre-emptive rights could be used only when the amendment of increasing the number of shares was authorized in the original charter, 2) asserting that the shareholders might limit or waive their pre-emptive rights in advance, and 3) asserting that pre-emptive rights could not be used in the case of a qualified increase. This latter point, notwithstanding of its lack of logic, has been widely recognized in almost all states. Cf. Berle-Means, pp.145-146 ;and Buchanan, pp. 79 ff.

3. V.Morawetz, A treatise on the Law of Private Corporations, vol.I, p.144.

4. Thompson, vol.II, p. 1586.

Much smaller space in comparison is devoted to reduction of capital, though it can be asserted that a reduction may always have a more harmful effect upon the dividend and other rights of the shareholders than an increase¹. There is no uniform system of treating this question in the various statutes of the various states. Only in a few states is "reduction" particularly mentioned in the chapter headings²; sometimes there are only one or two sections in a chapter on "Shares of Stock"³, or "Amendment of Articles of Incorporation"⁴; but there are even cases where the word "reduction" or its equivalent do not occur at all on the headings of individual sections⁵. The rule that a reduction of capital may be made only by the methods prescribed by the statutes is observed quite rigidly⁶. Only a few statutes⁷ include reacquisition of shares⁸ as one of the approved methods and then only in exceptional circumstances⁹, since it is usually held that the company's assets have been reduced by the amount paid for the acquired shares, while the proportionate interest of each of the other shareholders

1. E.O.Curran, "Minority Stockholders and the Amendment of Corporate Charters", in : "Michigan Law Review", vol.32 (1934), p.767 ; E.C.Lasseigne, "Recapitalization and Reorganization" of Corporations ...", in : TLR, vol.24 (1949), pp. 324 ff.

2. California (Chapter 5, ss.1900 ff.); Pennsylvania (Article VII, ss.701 ff.).

3. Washington (Chapter 23.16 : "Shares of Stock", ss.130 and partly 140).

4. Indiana (Article 3 : "Amendment of Articles of Incorporation", s.30 only).

5. Cf. e.g. Michigan. It was held in a few states that since the laws were silent as to reduction (e.g. formerly in Louisiana) the power of reducing the capital should be denied. Cf a note in : "Albany Law Journal", vol.32 (1885), pp.256-257.

6. This is contrary to the attitude in Scots and English Law. Cf. supra p.91 and note 4

7. Cf. e.g. Louisiana, s.23; Ohio (1955), s.1701.31.

8. Cf. supra pp. 108 ff

9. Dodd-Baker, p. 1232 ; G.S.Hills, "Model Corporation Law", in : HLR, vol.48 (1935), p.1340.

in the diminished assets has been increased by diminishing the number of outstanding shares, but that nevertheless such a transaction is not a reduction in the technical legal sense ¹. The statutes usually provide that shares of a certain class or classes may be made subject to redemption ². Some statutes also provide that upon such a redemption an amount not to exceed the capital represented by these shares may be charged to capital or nominal capital ³. Some of the statutes call this process "cancellation of shares by redemption" ⁴ contrasted with various "cancellations other than through redemption" ⁵; other statutes are less pronounced and couple the "redemption" with the purchase and "retirement" of the shares without a too precise definition of the notions involved ⁶. Usually the power to redeem is delegated by the articles to the board, and the effect of such redemption

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1. Although shares thus acquired are, unless formally "retired" (cf. infra p.239) by some approved form of reduction, treated as "treasury shares" and carried on the company's books as an asset, it is obvious that although the selling shareholder has given up an asset, the company has not acquired one. Such shares are of no value to the company unless and until resold.
 2. Only a few statutes distinguish between redemption at the option of the issuing company, and the option of the holder of the share. Cf. e.g. California (1949), s.1101; Florida, s. 612.09; Ohio, §§ 8623-8624. Cf. also: A.C.Becht, "Changes in the Interests of Classes of Stockholders by Corporation Charter Amendments reducing Capital and altering Redemption, Liquidation and Sinking Fund Provisions", in: "Cornell Law Quarterly", vol.36 (1950), pp. 1 ff; D.E.Bennett, "Remodeling, Merger and Dissolution of Louisiana Corporations: a critical survey", in: "Louisiana Law R.", vol.3 (1941), pp.500-501; Dodd-Baker, p. 1263.
 3. Cf. e.g. California, s.1706 (c); Delaware, §§ 13 and 27; Illinois, §§ 6, 14 and 58; Michigan, s.37; New Jersey, § 14.8-3; New York, § 28; Ohio, § 8623; Pennsylvania, s.705.
 4. Thus, e.g. in the very "up to date" Wisconsin Business Corp.Law of 1953 (ch.399). Cf. G.Young, "Some comments on the new Wisconsin Business Corporation Law", in: "Wisconsin Law Review"(1952), pp. 5 ff.
 5. Cf. e.g. Wisconsin, s.180.59.
 6. Cf. e.g. New York, § 28; on similar though not identical lines: Washington, s. 23.16.130.

is to reduce the actual value of the assets of the company by an amount that should not be greater than the capital represented by the redeemed shares ¹. It is the obligation of the board to ensure that by such a redemption the actual value of the company is not reduced below a figure which represents the total amount of the company's debts and liabilities, plus the amount of its capital reduced by the amount of capital so applied².

Other statutes put this figure at "the lowest aggregate amount of liquidation preferences of shares to remain outstanding having prior or equal claims to the assets" ³. Again, other statutes declare simply that no redemption may take place when the aggregate amount of the outstanding shares remaining after such a redemption would be thereby "impaired" ⁴. There are various rules about the financial plan of a redemption. A company may redeem its shares out of capital, out of borrowed money, but the most usual fund is called the "reduction surplus" ⁵.

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1. Cf. e.g. New York, § 28 (1) ; Pennsylvania, s.705 (A); Wisconsin, s.180.58 (1). Such shares are usually restored to the status of authorized but unissued shares. The amount of stated capital attributable to such a share shall be determined by dividing the stated capital by the number of shares of the class or series outstanding immediately prior to the acquisition of the share by the company. Cf. also California, s.1710 and New York, § 28 (2).
 2. Cf. e.g. Louisiana, s.45 (2) ; New York, § 28 (2) ; Washington, s.23.16.130.
 3. Cf. e.g. California, s. 1708 (3).
 4. Cf. e.g. Indiana, s.30 ; Michigan, s. 450.37 (1).
 5. Cf. e.g. California, ss.1906-1910 ("reduction surplus account"); Michigan, ss.450.37 and 450.43 (2) : mentioned indirectly only ; New York, §§ 28 (1)(3) and 36 (4)(c) ; Louisiana, s. 45 45 (IV). Cf. D.E.Bennett, op.cit., pp. 500 ff.; Callahan, "Statutory protection of creditors in Reduction of capital stock", in : "Ohio State Law Journal", vol.2 (1941), pp. 220 ff.

Some of the statutes provide for a formal "retiring" of uncalled shares, and for a reduction of the capital of the company by an amount equal to the capital represented by these retired shares ¹. Some of the statutes delegate to the board the power to retire such shares ², others treat it more on the lines of a normal statutory reduction implying either a formal vote of the shareholders, or their consent ³.

All these were the shortened forms of reduction ⁴, which somehow became in American practice the main ones, and overshadow in importance the normal type, usually called the "statutory" reduction. Compared with other systems of law, however, the latter is much easier and simpler, since the protection of the creditors' interests is much less emphasized ⁵, and the role of the courts and officials in checking the advisability of a reduction is comparatively small.

Almost all statutes provide the possibility of reducing the capital either by diminishing the number of shares or by diminishing the par value of the shares. The initiative lies usually with the board, who in a resolution set forth the amount and the manner of the reduction. The approval by vote or consent of the holders of the majority of all issued shares, or a qualified majority, is quite essential ⁶. The statutes usually allow a surplus

1. Dodd-Baker, p.1264.

2. New York, § 28 (1); Washington, s.23.16.130.

3. California, ss.1904 (1), 1905 (b), 1906 (1).

4. Cf. supra pp.179 ff.

5. E.C.Lasseigne, "Recapitalization and Reorganization ..", in : TLR, vol.24, p.326.

6. California, §§ 1904-1908 ; Illinois, § 59 ; Indiana, s.24 (a), s.26 (d)(e); Louisiana, s.45 (a majority of two thirds at a "duly for that purpose" called meeting); Massachusetts, § 41 ; Michigan, s.450.43 ; New York, § 35 (2)(C)(4), § 35 (4), and § 37 (1)(C)(1); Pennsylvania, s.706 (A); Washington, s. 23.16.120; Wisconsin, s.180.51 (a majority of two thirds).

created through a reduction to be distributed among the shareholders ¹. This case is in practice the only one where the interests of the present, and, in some cases, of future creditors also may be affected ². In all other cases, however, the reduction of capital may be merely a means of eliminating or absorbing a present deficit created by operating losses, or a shrinkage in asset values ³, or of eliminating depreciation or fixed charges, or merely a financial plan to prevent a deficit ⁴; that is why, as a rule, the creditors are not directly affected ⁵. Usually the majority required for a statutory reduction is exactly the same as for a regular

1. Dodd-Baker, p.1279.

2. Theoretically the creditors may also be interested in a reduction where shares have been only partly paid up, where the reduction applies exclusively to a diminishing of the liability of subscribing shareholders concerning uncalled shares. Cf.: Callahan, "Statutory protection of creditors ..", in : "Ohio State Law Journal", vol.2 (1941), pp.220-225 ; G.R.Carpenter, "Reduction of capital stock - disposal of the resulting surplus", in : "Texas Law and Legislation" (1947), pp.276-285 ; E.H. Warren, "Safeguarding the creditors of corporations", in : HLR, vol.36 (1923), pp. 509-538 ; G.W.Wickersham, "The capital of a corporation", in : HLR, vol.22 (1909), pp.319-338.

3. E.C.Lasseigne, op.cit., p. 325.

4. There may be various economic backgrounds to such a reduction : a deficit caused by the company's operations, discrepancy between the value of the assets on the company's books and the actual costs, inadequacy of prior reserves for depreciation or depletion, or an extraordinary loss not compensated by insurance. Cf.D.E.Bennett, "Remodeling, Merger and Dissolution ..", in : "Louisiana Law Review", vol.3 (1941), p.498 ; Dodd-Baker, p. 1280.

5. Nevertheless, the creditors may be indirectly affected by the impact a reduction may have on the "freedom" of the company after such a reduction, either to pay dividends or to purchase out of the "reduction surplus fund" or the future earnings of the company shares in order to redeem them. These are the most widely spread causes of recent reductions in American companies. Notwithstanding such an impairing of the creditors' interests, there is practically no legal way given to the creditors to interfere with such types of reduction. Cf.D.E.Bennett, op.cit., p.500 ; Dodd-Baker, p.1280 ; E.C.Lasseigne, op.cit., p. 326.

amendment of the charter. Only a few states now require a qualified majority for a decision on reduction ¹, and even fewer provide for a quorum ². In some statutes there is a provision in specific cases for a qualified majority of, say, two thirds of all issued shares of any class or series, often regardless of any limitations or restrictions imposed on the voting power, attaching to them, e.g.:

- a) if the dividend rate is to be reduced,
- b) if previously issued shares are to be made non-cumulative as to dividends,
- c) if the redemption price of the shares is to be reduced,
- d) if their financial preference in case of a winding-up is to be reduced, or
- e) if pre-emptive rights are to be reduced or altered ³.

Some states provide for a minimum limit of reduction, forbidding the capital to be reduced to an amount "less than the aggregate preferential amounts payable upon all issued shares having a preferential right in the assets of the corporation in the event of involuntary liquidation, plus the aggregate par value of all issued shares having a par value but no preferential right in the assets of the corporation in the event of involuntary liquidation" ⁴. Only a very few states provide for a legal minimum capital

1. Cf. e.g. Wisconsin, s.180.51. Cf. K.K.Luce, "Legislative amendment of corporation statutes - the Wisconsin problem", in: "Marquette Law Review", vol.30 (1946), pp. 20 ff.; G.Young, "Some comments on the new Wisconsin Business Corporation Law", in: "Wisconsin Law Review", (1952), pp. 5 ff.

2. Cf. e.g. California, s.2211.

3. Cf. e.g. California, s.3634. Cf. G.L.Stirling, "Amendments to Californian Corporation Laws 1937 : Readjusting stock structure", in: "California Law Review", vol.26 (1938), p.80.

4. Wisconsin, s.180.60 (2). On similar, though not quite identical lines : Illinois, Louisiana and some other states. Louisiana (s.45), New York (§ 37, 3a) and Washington (s. 23.16.120) applied here the same principle as in the case of redemption (cf. supra pp.237-238). Cf. D.E.Bennett, op.cit., p.499 ; Dodd-Baker, p.1285.

below which no reduction may go ¹.

The latest development of American jurisprudence indicates a differentiation within the notion "reduction", which may be considered as a parallel to similar differentiations in Scots and English Law ², and in German Law ³. While the old term continues to be used for any type of diminution of capital by the vote of the requisite majority in general meeting, at the same time - redemption, retirement and purchase, i.e. the types which are in the power of the board, are being split off in one direction, and recapitalization and reorganization ⁴ in the opposite direction. There are, of course, no strict limits yet fixed between the latter two types, and they are not yet accepted as new forms of alteration of capital in the texts of American statutes, but it appears that recapitalization covers alterations in the structure of capital without a strict reduction of the capital ⁵, though requiring a qualified majority to accept the amendment, whereas reorganization usually also involves a more radical change in the structure of the capital and the debts of the company, which could not be carried through without an alteration of the capital. These are still financial rather than legal notions, a recapitalization being usually considered as a prelude to a reorganization, or a means of avoiding it, or

1. T.E. Atkinson, "Vereinigte Staaten von Amerika", in : "Rechtsvergl. Handwörterbuch für Zivil- und Handelsrecht", vol. I, part 2, Berlin 1929, p. 693.
Cf. also supra pp. 178, 185, 192 and 203.

2. Cf. supra p. 89.

3. Cf. supra p. 182, note 2.

4. Dodd-Baker, pp. 1286 ff.; E.C. Lasseigne, "Recapitalization and Reorganization of Corporations under Louisiana Corporation Law", in : TLR, vol. 24 (1949), pp. 320-341; Rutledge, "Significant trends in Modern Incorporation Statutes", in : "Washington University Law Quarterly", vol. 22, pp. 305-337.

5. Cf. supra p. 60.

a milder form of reorganization¹. Cases where a reduction was carried through without a change in the voting power, or a change in the dividend rate were therefore sometimes called "quasi-reorganization"². Some other authors tried to classify as a new type of alteration those cases where the statutes provide for class-voting, calling them "readjustment of stock"³.

Curious and typical of American Company Law is the institution of appraisal⁴. Some of the statutes provide that a shareholder who is not assenting to a fundamental corporate change is entitled to demand the fair cash value of his shares⁵. Sometimes this rule is only applied to cases of merger and consolidation⁶, but in other statutes it applies to all cases where preferences are altered. A series of qualifications considerably limiting the applicability of this institution is found. One of them is indirectly connected with those types of reduction where a qualified majority is required, another requires that the company must be able to "meet its liabilities" at the moment of the alteration opposed by dissenting shareholders, and a third excludes the right of appraisal in cases where 80% or more of the voting power have voted in favour of the suggested alteration⁷.

1. E.C.Lasseigne, op.cit., p.320.

2. Dodd-Baker, p. 1286, note 1.

3. G.L.Stirling, "Amendments to Californian Corporation Laws 1937 : Readjusting stock structure", in : "California Law Review", vol.26 (1938), p.79.

4. This institution of appraisal may have slightly influenced s. 287 of the C.A. of 1948 (11 and 12 Geo VI, c.38).

Cf. also : A.C.Becht, "Corporate Charter Amendments : issues of prior stock and alteration of dividend rates", in : CLR, vol.50 (1950), p.923.

5. Louisiana, s.52 ; Massachusetts, s.46 ; Pennsylvania, s.810 ; Washington, s.160.

6. E.g. California and Indiana.

7. D.E.Bennett, "Remodeling, Merger and Dissolution of Louisiana Corporations : a critical survey", in : "Louisiana Law Review", vol.3 (1941), pp.482 ff., and p.493.

The terms and formalities of a formal claim for appraisal are usually very strict, though there is a recent trend to abolish them or to make them more easy and less formal ¹. Some attention has recently been given to the question of the acquisition of these shares, and whether, if at all, pre-emptive rights could be operated in these cases ². It is worth while noting that this institution of appraisal has some traits in common with the Italian Law right of dissenting shareholders to ask for their proportionally satisfaction ³.

1. Dodd-Baker, p. 1334.

2. J.J.Kaplan, "Problems in the acquisition of shares of dissenting minorities", in : "Boston University Law Review", vol.34 (1954), pp. 291 ff.

3. Cf. supra p. 210.

9. L i e c h t e n s t e i n .

The tiny Principality of Liechtenstein has earned some measure of fame in connection with its strikingly modern legislation ¹. It had inevitably been doubted whether there was enough economic background for a highly developed legislation, since its ten thousand rural inhabitants grouped into wine growing and cattle keeping communities in a total area of less than 60 sq.m. ² would scarcely suggest this. The opposite point of view was that its law, especially concerning holding companies and their taxation, is nothing else than a means of attracting foreign capital seeking cheaper countries for a formal domiciliation of their companies, and of "making the little principality of Liechtenstein the Delaware of Europe" ³.

The impact of American Law was apparent on the Civil Code of 1926, which following the single codex principle of Swiss Law, covered also commercial and company law. The company law of this code contained all the latest features of a liberal company law of American origin : the principles of "authorized capital", no-par-value shares, increase of capital before the previously issued shares were fully paid up, etc. A great many of these features of the law of Liechtenstein have since then become common property

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1. E.Beck, "Liechtenstein", in : "Rechtsvergleichendes Handwörterbuch für Zivil- und Handelsrecht" (ed.by F.Schlegelberger), vol.I, part I, Berlin 1927, pp. 117 ff.
 2. Rauch, vol.I, pp. 93-94.
 3. A.H.Feller, "The movement for corporate reform : a world-wide phenomenon", in : "American Bar Association Journal", vol.20 (1934), p.348.

to almost all the legislations of Europe, and so the advantages of some of them have perhaps partly faded away. This study is not particularly concerned with the taxation side of holding companies which continue to register in Liechtenstein in surprisingly great numbers and give the inhabitants an almost tax-free life by supplying the state a never-ceasing source of income. The provisions on alteration of capital may interest us only as a comparatively early reception of ideas of American Law.

The style, though not so much the content, of the Civil Code of Liechtenstein is very much like Swiss Law ¹. Sections 261-367 are devoted to limited companies ². The principle of no-par-value shares is provided for in one of the first declaratory sections ³. The institution of authorized capital ⁴ is treated as a sub-type of limited company ⁵. The Law of Liechtenstein, following an American idea, provides that the capital in these companies may not only be raised up to a sum mentioned in the charter, but also diminished (without any formalities and decisions in general meeting) down to another minimum mentioned in the charter. The provision that in the case of such a diminution of the capital of such a "variable" company the sum of the liabilities and of the remaining capital must always be above the total of the assets ⁶ is suggestive of an American origin.

1. Arminjon-Nolde-Wolff, vol.II, pp. 220 and 417.

2. "Das Personen- und Gesellschaftsrecht ... vom 20.Jänner 1926 ", (being part III of the "Liechtensteinisches Zivilgesetzbuch"), Vaduz (s.a., after 1928), pp.142-198.

3. Art. 262.

4. G. : " ... veränderliches Einlagekapital".

5. Art. 361-367.

6. Art. 363 (1).

Like Swiss Law, the law of Liechtenstein deals with the "normal" type of increase of capital in the third, or "C", sub-division of the chapter, bearing a very similar heading "The protection of the sharecapital and of the shareholders" ¹. It provides for an increase of capital by issuing new shares with or without a simultaneous reduction ². Unless mentioned in the charter, no quorum or qualified majorities are required ³. The previously issued shares need not be fully paid up, but in the case where the previous shares were issued below par the difference has to be made up from surplus or reserves before a new issue of similar type can be effected. Qualified increase by issuing new shares is provided for ⁴, although the formalities surrounding the general meeting necessary thereto are strictly to be observed - a two thirds quorum, and a two thirds majority are both required, and further, shareholders participating in the invecta et illata are void of their voting rights and are considered as unpresent at this general meeting. An unusual provision of this sub-division is the rule enumerating the cases where an issue of new shares, or an exchange of share-documents may be effected without cash or any other consideration ⁵. This list contains the following cases :

1. Art. 292-306.

2. Art. 295.

3. A quorum of two thirds in a "first" meeting and of only one third in a "second" one is provided in Art. 294 for all general meetings deciding on an extension of business (G.: "Erweiterung des Geschäftsbereichs"), or narrowing down (G.: "Verengerung") or amalgamation. It is nowhere, however, laid down whether that applies to an increase of capital also. I rather think it does not. A majority of three quarters of all present and of two thirds of all the shares of the capital is provided for in Art. 293 (3) for all amendments of the charter cancelling provisions containing restrictive requirements concerning general meeting decisions.

4. Art. 296 (1).

5. Art. 297.

1. an increase in compensation of a debt,
2. issue of new shares against debentures,
3. increase of the amount of issued shares out of reserves or surplus ¹,
4. readjustment of the nominal value of the shares, especially in the case of : a) an inflation of the currency ², or
b) a transfer of "silent" reserves ³,
5. reduction of the nominal amount of the shares ⁴,
6. translation of the capital or a part of it ⁵ into an alien currency,
7. translation of the nominal value of the shares into an alien currency,
8. exchange of preference shares against common stock ⁶.

The same sub-division contains provisions for gratis shares ⁷, and pre-emptive rights ⁸. This last provision is curious in many respects. Firstly, a quite unusual feature is that the charter may impose on some shareholders ⁹ the obligation to subscribe for new shares ¹⁰. Secondly, Swiss-American jurisprudence and theory have apparently influenced the text of this section to a remarkable amount, since pre-emptive rights were defined

1. G. "Aufstempelungen oder Aufhöhungen".

2. It is submitted that this is the only known case where a possible inflation of the currency is anticipated in a statute.

3. G. : "Aufwertung oder Aufnumerierung".

4. G. : "Abstempelung oder Abwertung".

5. This is, again, a unique case where the capital of a company may be expressed in, say, two or three different currencies.

6. G. : "Stammaktien".

7. Art. 302.

8. Art. 303.

9. Not to holders of share-warrants, only to "Namensaktionäre".

10. G. : "Bezugspflicht". Cf. the marginal notes to Art. 303, and Art. 303 (4).
Art. 303 (5) : "... Bezugspflicht ist eine Last ...". Cf. Hallstein, p.189.

as "awaiting rights in order to procure new shares" ¹, and as "an ingredient part and not (sic !) proceeds of the share" as an imaginary quota of the capital ². Thirdly, it is provided that pre-emptive rights, though only if limited to a particular issue and with the permit given by a state authority, may be promised even prior to the general meeting deciding on the increase ³.

The "normal" type of reduction is dealt with in another, the eighth or "H", sub-division of the same chapter ⁴, bearing the marginal heading : "Repayment and other reductions of the share capital". A repayment is permissible only if all the rules regarding a repayment of capital in the case of a winding-up are complied with, unless a sufficient amount of assets to cover all liabilities is left over, or a new "cushion" of reserves is created for this purpose ⁵, or the sanction of the creditors to the proposed reduction is to hand.

Finally, the following miscellaneous points should also be noted : As in Swiss Law an induciae of six months is provided for, but only for a reduction without repayment ⁶. An unusual feature of these provisions is the rule concerning a shortened form of reduction ⁷. A board of directors is according to this rule entitled to reduce capital (without a decision

1. G. : " ... anwartschaftliches Recht auf den Bezug neuer Aktien".

2. Art. 303 (1)(5) : " ... Teil der Aktie, jedoch keine Frucht ..."

3. Art. 303 (3).

4. Art. 355-360.

5. This idea is, again, of American provenience.

6. G. : " .. blosse Herabsetzung".

7. Art. 356. Cf. supra pp. 179, 239 and 242.

in general meeting and without complying with all the provisions concerning an amendment of charter and repayment), and to repay a fraction¹ of the share amount, provided only that this amount remains the liability of the shareholders². A reduction-cum-conversion is permissible only with the consent of the shareholders³. A reduction by redemption is provided for⁴. The law of Liechtenstein provides also for a readjustment of the nominal amount of the shares without an alteration of capital, though it must comply with all the regulations on amendment of the charter⁵.

These regulations, though they may have seemed very up-to-date in the late twenties, are in some respect quite old fashioned when we compare them with the latest developments in American Law.

1. The reduced amount of capital should in no circumstances be smaller than 20% of the previous amount in case of name shares (G.: "Namensaktien"), or 50% in case of share-warrants.

2. G. : " ... Vorbehalt der Wiedereinzahlung". Cf. supra p. 94, note 2.

3. Art. 357.

4. Art. 358-360.

5. Art. 264-265.

10. Sweden.

The general origins of Swedish Law are Germanic. There was, of course, some influence of Roman Law too ¹, but it was never accepted as current law as it was e.g. in Germany up to 1900 ², and in Latvia up to 1938. Foreign law, however, , makes very little impact now, especially as regards Family Law, Law of Inheritance, and Law regarding Immovebles and Movebles, although there is an exception to this in the field of Commercial Law ³. Attempts to achieve unification of law within Scandinavian countries, starting in the eighties of the nineteenth century ⁴, were not always favorable for borrowing alien matter into Swedish Law. The impact of modern German jurisprudence and of the theoretical approach to legal problems was less apparent in Sweden than in Denmark and Norway ⁵.

Special statutes regarding limited companies were published in 1848, on 28th June 1895, on 12th August 1910 ⁶, and on 14th September 1944. Up to

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1. Cf. Ph.H(ult), "Storia del diritto Svedese", in : "Enciclopedia Italiana", vol.33, Rome 1937, pp.69 ff.; Toynbee, vol.VII, p. 286.
 2. H.Munch-Petersen, "Main features of Scandinavian Law", in : LQR, vol.43 (1927), pp.366 ff.
 3. K.Olivecrona, "Schweden", in : "Rechtsvergleichendes Handwörterbuch für Zivil- und Handelsrecht" (ed.by F.Schlegelberger), vol.I, part 1, Berlin 1927, pp. 218 ff.
 4. Förhandlingar vid andra nordiska juristmötet i Stockholm, Stockholm 1876 ; L.B.Orfield, The Growth of Scandinavian Law, Philadelphia 1953, pp.60 ff., pp.107-112, pp. 210-212, pp. 302-306.
 5. H.Munch-Petersen, op.cit., p. 366.
 6. Almost simultaneously with a similar law in Norway. Cf. C.Haffner, Das norwegische Gesetz über Aktiengesellschaften vom 19 Juli 1910, verglichen mit dem deutschen Recht, Erlangen 1913 ; K.Lehmann, "Norwegisches Gesetz über Aktiengesellschaften und Komanditgesellschaften auf Aktien", in : ZHR, vol.69 (1911), pp.502 ff.; and Rauch, vol.I, p.82.

1895 the principle of "concessions" by the state was the leading factor, but some signs of relaxation of this principle became apparent already in 1891, and after that as well. The law of 1910 was in some respects drafted on the lines of the German HGB : the general impression was that it was a simplified edition of the German system ¹, though in some questions a more complex approach was adopted, partly perhaps to facilitate the supervision of the companies by the state. The Germans always tried to consider Swedish Company Law as a modification of German Company Law ², but this is perhaps only true in part.

Alteration of the charter required under the law of 1910 a qualified majority ³, but when a variation of the rights of the shareholders had to be considered, unanimity was necessary ⁴. Besides the usual increase by issuing new shares, an increase out of surpluses ⁵ was provided for then, and, though not explicitly ⁶, an increase by augmentation of the nominal amount of the shares also. An issue of new shares was possible only after

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1. It was asserted that the Scandinavian characteristic was a "precocious freshness and originality and a precocious clarity and rationalism" (Toynbee, vol. VII, p. 446, note 3). One may agree that that applies also to a legal clarity of expression, at least in comparison with the German mode of expression.
 2. F. Crusius, *Ein Vergleich zwischen dem deutschen und schwedischen Aktienrecht*, Erlangen 1926 ; Hamburger, p. 84 ; I. Strahl, in : "Annuario di diritto comparato", vol. VI, part 1, (1931),
 3. § 91. Cf. also : F. Guse, *Die Gründung einer Aktiengesellschaft, die Kapitalerhöhung und Kapitalherabsetzung in den skandinavischen Aktiengesetzen im Vergleich mit den Bestimmungen des deutschen Handelsgesetzbuchs*, Freiburg i. Br. 1923.
 4. Hamburger, p. 85.
 5. This was a novelty then, since the law of 1895 completely omitted such a possibility. Cf. § 47 (5).
 6. Cf. *infra* p. 255, note 4.

the prior ones were fully paid up ¹. A resolution in general meeting, or, at least, a sanction by the general meeting of a resolution made by the board of directors ² was considered essential even in cases of an alteration within the framework of authorized capital ³, the only exception being that a qualified majority was not necessary when the total amount of capital was kept below the sum adopted as authorized capital. Pre-emptive rights were recognized in principle ⁴. The process of an increase had to be completed within one year ⁵. Formation of a company and an increase of capital were generally considered analogous, more or less on the lines of German Law. Reduction of capital ⁶ without consent by the court was possible only where redeemable shares were concerned. The pre-requisites of consent by the court were as follows :

1. a valid resolution in general meeting in accordance with all the requirements concerning an alteration of the charter ⁷,
2. formal publication of such a resolution,
3. securing of payment of the full amount of the creditors' debts or claims,
4. (in the case of multifirmity of shares) a valid resolution in those class meetings which would be affected by the redemption of shares, or by the reduction of capital ⁸.

1. § 35. Cf. Hallstein, p.183.

2. Hallstein, p. 184.

3. § 35 (iii), and § 46.

4. §§ 39-40, and § 47 (7). Cf. Hallstein, p.190

5. § 44. Cf. Hallstien, p. 186.

6. A special law concerning reduction of capital was issued on 28th March, 1924.

7. § 93 (1). Cf. Hallstein, p.194.

8. The law of 28th March, 1924, provided for a three quarters majority in each of these cases.

The present Law on Limited Companies ¹ came into force on 1st January, 1948. This law, though in many respects following traditional lines, is evidently under the influence of recent American legislation, especially in the abundance of detail, surpassing in this respect the older Swedish statutes, and the German laws of 1900 and 1937. Whereas the law of Liechtenstein shows an influence of some early ideas of American origin, this Swedish companies act indicates an impact of American statutes of the late thirties.

Twenty two sections (§§ 48-69) are entirely devoted to questions concerning alteration of capital ². These twenty two sections cover almost ten pages of the Swedish statute book ³, or almost eighteen pages of the American translation of it ⁴. Unlike the stress put upon reduction by Scots and English Law, there are more regulations about increase than reduction ⁵.

Though the greater part of the subdivision on "increasing the capital stock" ⁶ is devoted to the standard type of increase, i.e. the increase by a new issue of shares ⁷, there are two sections ⁸, which regulate the

1. Svensk Författningssamling, No.705, 2nd Nov., 1944. A translation by American lawyers was published in 1949 by the Svenska Handelsbanken, Stockholm (s.a., 1949).

2. There are besides other provisions scattered through the Companies Act. Cf. infra pp. 261 ff.

3. Svensk Författningssamling, 1944, No.705, pp.1492-1501.

4. The Swedish Stock Corporation Act, Stockholm (s.a., 1949)■, pp.33-51.

5. Cf. supra pp. 71, 87 and 236.

6. The "Foreword" to the American edition of the Swedish Companies Act stresses that the translators have generally adopted the American legal phraseology although in many cases the Swedish original is textually nearer to the English usage. Thus, e.g. the Swedish "aktiekapital" is, of course, terminologically nearer to the English term "share capital" than to the American "capital stock".

7. §§ 48-62.

8. §§ 63-64.

increase of capital by decision of the board ¹ (§ 63), and increase by stock dividend ². Since both these minor types of increase are nonetheless visualizing an issue of new shares ³, they seem to embody varieties in procedure rather than in structure ⁴. Unlike Scots and English Law ⁵, all details are elaborately set out in the *sattute* book, and the whole style of Swedish Companies Act is much more reminiscent of American statutes.

A resolution in general meeting ⁶ and authorization by the articles ⁷

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1. The Swedish text throughout calls the Board of Directors, simply and in one word, "styrelse", which is inconsistently translated sometimes as "board of directors", and sometimes as board only.
 2. Since the headings of the different sections are an invention of the American translators, one should be careful in adopting this technical term "stock dividend", although it is familiar in America (cf. *supra* pp. 231 ff.), since the Swedish text does not have any particular name for this variety of increase. Cf. *infra* p. 260.
 3. Cf. § 63 (5), and § 64 (1)(4) and (2)(3-4).
 4. Rauch (vol.I, p.82) imagined that an increase of capital simply by augmentation of the nominal value of shares and without issuing shares was still possible. He thought however, that the actual text of the statute did not explicitly mention this possibility, being apparently not aware of the wording of § 133 (I and IV), where the possibility of an increase or reduction of the amount "for which ... may be issued" was provided for.
 5. Cf. *supra* p.p. 71-72.
 6. Swedish : "bolagsstämma". The American translation of it "meeting of the shareholders" (§ 48, part 1) is not quite correct since the word "shareholders" (Swedish : "aktieägare") is not used at all in this place. A better rendering of the Swedish term for general meeting is given, e.g., in § 41 ("meeting of the corporation"), or in § 114. The term "meeting of the corporation" is much more adequate to the status of a limited company as a legal entity than the rather informal "meeting of the shareholders".
 7. Swedish : "bolagsordningen". American translation : "By laws". They correspond more or less to the "articles of association" of Scots and English Law. The "articles of incorporation" (§ 6, Swedish : "stiftelseurkunden") correspond to the "memorandum of association", but the "memorandum of incorporation" (§ 11, Swedish : "stiftelsekungörelsen", i.e. advertisement of the formation) is rather a Swedish peculiarity, and means only a statement for publicity purposes.
Cf. *supra* pp. 216 and 223, note 7.

are the main pre-requisites in Swedish Law. Unlike Scots and English Law ¹ a resolution uno flatu covering the amendment of the articles and the increase of capital itself is not admissible ². There are special provisions about unanimity and majority requirements in the case of an amendment ³. The extremely detailed provisions regarding the official proposal ⁴ of the board concerning the increase (a statement of opinion signed by all the members of the board is needed) and the publicity to be attached to it ⁵ may well seem to us to be strange. The contents of the resolution ⁶ regarding the projected increase are provided for in full detail ⁷. There have to be mentioned :

1. the amount of increase,
2. the classing of the new shares,
3. the preference rights ⁸, as provided in the Companies Act or in the charter,
4. the period within which all preferential purchases of new shares can be made by the shareholders ⁹,

1. Cf. supra p. 73, note 1.

2. § 48 (1).

3. §§ 133-134.

4. Swedish : "Förslag". The American translation renders that not quite correctly as "draft resolution", though s. 802 of Corporation Laws of Pennsylvania (§ 1951) uses the more exact "proposal of amendment". "Motion" or "suggestion" would be also a much nearer equivalent.

5. Filing of the whole set of balance sheets, of the profit and loss accounts, and of different statements for inspection at the office of the corporation. Cf. § 48 (2).

6. Swedish : "beslutet". Cf. supra p. 228, note 1.

7. § 49.

8. The Swedish "företrädesrätt" corresponds more to the usual "pre-emptive right" than the translation in the above mentioned edition, which speaks about "preferential rights". The usual American term is still : "pre-emptive rights".

9. Cf. also §§ 54-55.

5. the par value and the price of the shares ¹,
6. the method of allotment in case of an over-subscription,
- and 7. the moment when the dividend rights of the new shares will begin to operate. ²

Contrary to the older Swedish law, the Companies Act of 1944 does not provide strictly that the whole previous capital has to be fully paid up, but only that the amount of shares registered as fully paid ³ has to be stated in the resolution. The resolution may provide for a minimum amount ⁴ in the case of an under-subscription that would have a binding effect on the act of subscription ⁵. This same section also provides for the possibility of a reduction-cum-increase ⁶. Special attention is given to qualified increase ⁷.

As regards formalities, a resolution on increase has to be filed with the registrar ⁸. Since the only recognized procedure regarding increase is that by subscription ⁹, increase by simultaneous promotion ¹⁰ being unknown, it is provided that the text of the subscription lists and the appropriate publication has to be approved by the registrar ¹¹,

1. Cf. supra p.54; p. 80, note 1 ; and p. 228.

2. Cf. supra p. 59.

3. § 49 (2).

4. § 49 (3).

5. Though this seems to be a non-obligatory requisite of the resolution on increase, it is a very important one : if such a minimum is mentioned in the resolution, shorter terms of payment are applicable, but if such minimum is not mentioned, the provisions about amendment of the charter (§ 7) come into operation with all their rigidity in almost all cases.

6. § 49 (4) and § 65.

7. § 7 and § 60(2).

8. § 51.

9. §§ 52 and 57.

10. § 190 (2)(1).

11. § 53.

and his approval may not be granted before the resolution for an increase ¹ has been registered ². Further, it is necessary to announce in the official gazette and in a local newspaper that the increase has been completed ³.

Contrary to Scots and English Law ⁴, pre-emptive rights are still provided for in the Swedish Companies Act ⁵, though they are somewhat weakened in two directions - by the rather uncertain phrase "insofar as it is possible" ⁶, and by a cross-reference to the charter in case of a multifirmity of shares ⁷. As in German law, special provision is made regarding fractional pre-emptive rights ⁸, i.e. regulating the case where pre-emptive rights "vested in one old share do not cover one or more new shares". A special certificate for fractional subscription rights was introduced ⁹. If such certificates were issued, they must be surrendered at the time of the subscription for the new shares.

Special formalities are provided for the procedure of subscription ¹⁰. In the case of a qualified increase the subscription list may not be opened until at least two weeks have elapsed after the announcement ¹¹

1. § 51.

2. § 190 (2)(1).

3. § 54.

4. Cf. supra pp. 77 ff.

5. § 55.

6. Swedish : " ... i den mån det kan ske ...".

7. Concerning those companies with different classes of shares, the position of Swedish Law is similar to that in Britain in one respect : the provisions of the charter are decisive. Cf. supra pp. 57 and 77.

8. § 56.

9. Swedish : "teckningsrättsbevis".

10. § 57.

11. Swedish "kungörelsen" was translated as "memorandum of association" in §§ 11 and 17 but as "announcement" in §§ 52 and 54, though the Swedish terms used in all these places are almost identical.

has been inserted in the newspapers ¹. Conditional subscription is invalid unless it is especially provided for in the charter and referred to in the formal resolution on increase ². Immediately after the closing of the subscription list follows the allotment of the new shares ³, which is usually left to the discretion of the board of directors ⁴. Unlike Scots and English Law, there is a time limit in the Swedish Companies Act ⁵ within which the newly issued shares must be fully paid. This time limit is usually one year, but in the case where a subscription minimum is provided for ⁶ a special report has to be filed with the registrar within six months' time ⁷. Special provisions concerning a qualified increase "by compensation" are also made in this connection ⁸. Within six months after the expiry of the period fixed for making payments for the new shares another report has to be filed with the registrar, namely, about the shares fully paid-up ⁹, and minute details are given concerning the contents of this report ¹⁰. The board of directors ¹¹ is entitled to increase the capital subject to approval in general meeting, but the resolution ¹² of the board has to be approved

1. § 17 (2).

2. § 58 (2).

3. § 59.

4. § 49 (1)(6).

5. § 60.

5. § 49 (3).

7. § 61.

8. § 60 (2).

9. § 62 (1)(1).

10. Especially particulars about considerations other than cash.

11. Cf. supra p.255, note 1.

12. Swedish : "beslut". The American translation renders that as "decision" when speaking about the resolution of the board, but as "resolution" when speaking about the general meeting. The Swedish text, however, uses the same word in both cases.

by the registrar ¹. However, the new shares cannot be entered in the register before the general meeting has approved ² the resolution of the board ³.

Swedish Company law explicitly regulates the increase of capital by way of transfer of existing surpluses ⁴. If the company possesses undistributed profits which have not been set aside to a reserve fund, or to a debt-adjustment fund, a transfer of this profit to the capital account is permissible ⁵. Minute provisions follow concerning the proposal being made available for inspection ⁶, the right of the holders of "previous" shares ⁷ to have t h e s e new shares allocated to them ⁸, and the publication of the resolution ⁹, its filing and registration. Neither fractional scrip certificates ¹⁰, nor certificates for new shares may be issued to shareholders before the registration of this resolution, or before the shareholders have presented the share-certificates on which this right is based ¹¹.

1. § 63 (2).

2. Swedish : "godkännanda".

3. § 63 (5).

4. § 64. Cf. supra p.231 and p. 255, note 2.

5. This was not a new idea in Swedish Law, since it was based more or less on the provisions of § 47 of the Companies Act of 1910. Rauch (vol.I, p.82 and p.132, note 1) had presumably not noticed the difference in naming the fund : while formerly it was the "rejuvenation" fund (Swedish : "förnyelsefond"), it is now the "debt-adjustment" fund (Swedish : "skuldregleringsfond").

6. § 64 (1)(3).

7. Swedish : "företvarande aktier".

8. Though there is a similarity between pre-emptive rights and these rights, the Act stresses the difference by adopting another terminology : here the right of the shareholder is called the acquisition right (Swedish: "erhålla"), instead of the "pre-purchase right" (Swedish: "företträdesrätt"). Cf. supra p. 256, note 8. Cf. § 55 (second sentence) and § 64 (1)(4)(second sentence).

9. § 64 (2).

11. § 64 (2)(4).

10. Swedish : "delbevis", again different from "teckningsrättsbevis" used in connection with pre-emptive rights. Cf. supra p. 258.

As mentioned above ¹, this chapter ² is not the only place in the Swedish Companies Act where questions on increase of capital are dealt with. A chapter on amendments of the charter ³ contains minute regulations about the cases where such amendments also involve an alteration ⁴ of the rights attached to all ⁵ or certain shares. In some cases unanimity is required, in other cases a majority of at least nine tenths ⁶, but in cases where such an alteration of rights ⁴ is linked with increase of capital, a majority of two thirds in two successive meetings ⁷ is necessary, or in the case of a multiformity of shares, three quarters in two successive meetings in all classes concerned ⁸.

Another group of special provisions concerning increase of capital can be found in the chapter on existing restrictions on acquiring shares in certain cases, and concerning certain groups of persons ⁹. If such restrictions exist, reference to them is needed in the resolution ¹⁰, in the certificate for subscription rights ¹¹, in the report sent to the registrar ¹², and in the fractional scrip certificates ¹³. The registration office has power to grant or to refuse approval in cases where the company intends to increase its capital ¹⁴.

1. Cf. supra p. 254, note 2.

2. §§ 48 - 64.

3. §§ 133 - 137.

4. It is curious to note that the American translation uses two different verbs : "to alter" (e.g. in the first sentence of § 133) and "to affect" (§ 133, I 4), while the Swedish text uses only one term - "rubbas".

5. § 133 (1)(first sentence).

6. § 133 (1)(2).

7. § 133 (5).

8. § 143 (4).

9. §§ 177-187.

10. § 182 (1).

11. § 182 (2).

12. § 183 (1).

13. § 184 (2).

14. § 190.

As mentioned above ¹, much less space is devoted to the question of reduction of capital ², and in this respect too there is a similarity with American Law ³. Some of the types of reduction are mentioned in § 66 : redemption of shares, retirement ⁴ of shares without repayment to the shareholders, reduction of the par-value ⁵, and consolidation of shares ⁶. All reductions may be divided into two groups : with ⁷ or without ⁸ transfer of a corresponding sum to the reserve fund ⁹. A reduction by redemption within the framework of the authorized capital is permissible if and as authorized by the charter ¹⁰, but if an amendment of the charter is required for this purpose, such a reduction must be of the nature of an increase-cum-reduction ¹¹. An unusual item is the provision that no reduction by redemption ¹² is possible if the balance sheet for the preceding fiscal year shows that after the reduction the reduced amount of capital and the corresponding amount of the reserve fund would not be adequately covered, or if the sum of the reduced capital, the reserve fund and the debt-adjustment fund would be less than the amount of the debts of

1. Cf. supra p. 254.

2. §§ 65 - 69.

3. Cf. supra p. 236.

4. Sw.: "indragning av aktier". American influence is evident here again (cf. supra p. 239).

5. Sw.: ".. nominella belopp".

6. Sw.: "sammanläggning av aktier". § 222.

7. § 68.

8. § 67.

9. The Swedish text speaks always about "reservfonden", never using the descriptive epithet "legal".

10. § 65 (1).

11. § 65 (2).

12. Though the text does not specify explicitly that this provision applies only to reduction by redemption within the framework of authorized capital, this is evident from the place which this provision holds in this chapter on Reduction. Cf. also the initial sentence of § 66.

the company. For this purpose the balance sheet is a necessary part of the report ~~that~~ has to be filed with the registration authority. Such a reduction by redemption can be decided upon either in general meeting or, as may be provided for by the charter, by the board and the managing director ¹.

All other types of reduction, including reduction by redemption outside the framework of the authorized capital, have to be decided upon in general meeting.² This proposal has to be made available for inspection ³. The contents of the resolution in general meeting is, again, given in full detail ⁴. The whole process of such a reduction, including the filing with the registration authority, has to be completed in four months' time, or else the resolution on reduction is deemed to have lapsed ⁵.

The difference between a reduction with or without a transfer of a corresponding sum to the reserve fund ⁶ lies in whether the sanction of the court is needed or not. When there is no sum transferred to the reserve fund the reduction is ineffective w i t h o u t the sanction of the court ⁷,

1. § 65 (4).

2. § 66 (1)(1).

3. § 66 (1)(2). Cf. supra p. 260.

4. § 66 (1)(3).

5. § 66 (1)(4-5). Swedish : " ... nedsättningsbeslutet förfallet ..".

It is interesting to note this laconic style of the Swedish original as compared with the American translation.

6. Cf. supra p. 262, note 9.

7. Swedish : " ... rättens tillstånd". The American translation renders it sometimes (e.g. § 67) with "sanction of the court", and sometimes with "permission of the court", or "court's permission" (e.g. § 68), though the original text uses only one term for it.

Cf. also the initial sentence of § 67.

but in the other case, i.e. when there is a transfer of an appropriate sum to the reserve fund, the sanction of the court is required only for the payment of dividends, except when the capital is increased by an amount corresponding to the reduction¹ in the case of a reduction-cum-increase². The Act thereafter³ deals with the formalities involved in obtaining the sanction of the court. As is the case in German Company Law, an induciae of six months has to expire⁴ before the decision of the court can be registered, or a repayment to the shareholders made⁵. The acquisition of shares by the company itself is valid only in connection with a reduction of the amount of the acquired shares. The sanction of the court⁶ is needed in this case too, unless it can be operated as a reduction by redemption within the framework of the authorized capital⁷. In other cases all shares bought by the company have to be resold as soon as possible without loss to the company⁸.

1. § 68 (initial sentence).

It should be noted that the words : " by an amount a t l e a s t corresponding" would have lessened the formalities of this provision.

2. Cf. supra p. 257.

3. §§ 67 and 68.

4. § 67 (1)(5).

5. § 66 (2)(2) and § 67.

6. This is implied from the quotation of § 67 in the first sentence of § 69.

7. § 65. Cf. supra p. 262.

8. § 69 (2).

11. Spain.

The origins of Spanish Law are, of course, Roman Law, though its influence is not apparent to the same extent in all questions. Spanish commercial law retained its own character up to 1829, when a new code was promulgated, mainly following the lines of French Law. However, this French influence spread over civil law only in 1889, much later than in almost all the Ibero-American states¹. There the commercial and company laws also developed more or less on the lines of the Code de Commerce of Napoleon. On the other hand, a slight diminishing of French influence was noticeable at the same time in Spain. Thus, the

1. T. Ascarelli, Problemas das Sociedades Anonimas e direido comparado, S. Paulo 1945 ; J. Barra, Estudio Comparativo de la Legislación de las sociedades par acciones, Mexico 1909 ; L. Cornejo, Derecho Commercial, vol. I, Lima 1935 ; H. P. Crawford, "The Corporation Law of Cuba", in : TLR, vol. 10 (1936), pp. 568-588 ; H. P. Crawford, "The Brazilian Business Corporation", in : TLR, vol. 11 (1936), pp. 59-80 ; H. P. Crawford, "The Corporation Law of Venezuela", in : TLR, vol. 12 (1938), pp. 200-225 ; H. P. Crawford, "The 1940 Corporation Law of Brazil", in : TLR, vol. 16 (1942), pp. 228-248 ; E. Dihigo, Sociedades de responsabilidad limitada, La Habana 1936 ; B. di Faria, Direito comercial, Rio de Janeiro 1947-48 ; A. Féeasse, Les sociétés anonymes dans la Republique d'Argentine, Paris 1928 ; Fernandez, Código de Comercio Comentado, Buenos Aires 1943 ; W. M. Ferreira, Compendio de sociedades mercantis, Rio de Janeiro 1949 ; L. Mascheroni, Contabilidad de sociedades anónimas, Buenos Aires 1932 ; P. de Sola Canizares, Les sociétés commerciales en Argentine, Paris 1949 ; P. de Sola Canizares and H. Aztiria, Tratado de Sociedades de Responsabilidad Limitada en derecho Argentino y Comparado, vol. I, Buenos Aires 1950 ; R. G. Suarez, Aumento del capital social, Mexico 1941 ; T. de M. Valverde, Sociedades por ações, Rio de Janeiro 1953 ; G. H. Voelkel, "A comparative study of the laws of Latin America governing foreign business corporations", in : TLR, vol. 14 (1939), pp. 49-71.

new Commercial Code of 22nd August, 1885, has shown more features of its own than the previous one of 1829¹. A remarkable feature of Spanish company law of that time² was a lack of the conception of legal personality which, one would have thought, should have been apparent in view of Roman Law being the ultimate forebear of Spanish Law and jurisprudence. On the contrary, the stress on the contractual relations in company law was much heavier than in other legal systems which have their origin in Roman Law³. It was only with its Companies Act of 1951⁴ that Spain came into line with other legal systems possessing modern companies acts. The former law was completely silent on the questions of alteration of capital⁵, and the methods adopted in practice⁶ were to some extent similar to those of older English and German Law, since there also the contractual relations were considered as more important than those based on the conception of legal personality.

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1. Arminjon-Nolde-Wolff, vol.I, p.159.
 2. Lit.: F.Ehrenfried, Das Aktienrecht Spaniens von seinen Anfängen bis zur Gegenwart, Berlin 1936 ; Garrigues, Curso de Derecho Mercantil, vol.I, Madrid 1936 ; J.Moneva y Puyol and L.Perels, "Spanien", in : "Rechtsvergleichendes Handwörterbuch f.Zivil- und Handelsrecht" (ed.by F.Schlegelberger), vol.I, part 1, Berlin 1927, pp.245-265 ; H.Prudhomme, Code de Commerce espagnol, Paris 1891 ; P.de Sola Canizares, Le droit espagnol des sociétés anonymes, Paris 1947.
 3. Cf. Ph.de Sola Canizares, Le droit espagnol des sociétés anonymes, Paris 1947, and a report on this book in : "Revue International de Droit Comparé", vol.I (1949), pp.218-219.
 4. Ley de 17 Julio de 1951 sobre Regimen Juridico de las Sociedades Anónimas. This study quotes from the text published by Camara Oficial de Comercio, Industria y Navegación de Bilbao, Bilbao 1951.
Lit. : Garrigues and Uria, Comentario a la Ley de sociedades anónimas, Madrid 1953 ; Gay de Montella, Tratado Práctico de Sociedades Anónimas, Barcelona 1952 ; R.Quintano, Diccionario de derecho comparado, Madrid 1951 ; F.de Sola Canizares, Tratado de sociedades anónimas en el derecho español y en el derecho comparado, Barcelona 1952. See also : P.J.E(der), "Spain : New Law of Stock Companies", in : "The American Journal of Comparative Law", vol.1 (1952), pp.117 ff.
 5. G.Hubrecht, "La nouvelle loi espagnole sur les sociétés anonymes", in : "Revue International de Droit Comparé", vol.3 (1951), p.463.
 6. Rauch, vol.I, p.76 (1).

The new Act is rather short, containing 171 sections. The fifth¹ chapter, containing merely 18 sections, is devoted to increase and reduction of capital, and amendments of the charter². The system and style of this Act is extremely simple and logical. An impact of certain ideas of American origin is nevertheless apparent, though expressed in an extremely dry form and without any details. This might be not so much the result of a draftsman's triumph, as simply a sign of undeveloped capitalism³. On the other hand, the omnipresence of state control in Spain may also be one of the reasons for the very short form in which these provisions are set⁴. Besides, Swiss influence in drafting this law may also have been present.

The placing of both the main types of alteration of capital - increase and reduction - side by side with amendments of the charter is, of course, an achievement from the point of view of legalistic system. We find this as well in Article 58, where the basic principles on qualified majority are provided for⁵, as also in Chapter Five¹, although the material is better arranged in the contents of this chapter than in its heading. The

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1. Art. 84-101.
 2. Spanish : " Aumento y reduccion del capital. - Modificación de los Estatutos".
 3. It may be said that there is even yet no necessity for any "education" of the investors. Cf. supra p. 228, note 2.
Cf. C.L.Israels, "Problems of par and no-par shares : a reappraisal", in : CLR, vol.47 (1947), p.1300.
 4. Cf. supra p. 44, note 3.
 5. Art. 84 (2) refers to this general rule on qualified majority. On the other hand the requirements of this Art.84 are referred to in Art. 87 dealing with any kind of increase of capital mentioned in the charter, in Art.93 dealing with the issue of new shares as preference shares, in Art.97 dealing with any kind of reduction of capital mentioned in the charter, and, finally, in Art.100 (2), which deals with amortization of shares.

qualified majority required for any type of increase, or reduction, or any other amendment of the charter is very complex. A more or less usual feature is the provision for different majorities in the "first" and in the "second" meeting ¹, but the provision of different methods of determining the two thirds according to whether the shares are name-shares ², or share-warrants ³, seems to be quite unique. In the first of these cases the result is not only counted by the number of shareholders ⁴ but also "weighed" by the value of the paid up capital ⁵. For a valid resolution at the first meeting a two thirds majority is necessary by both methods, while in the case of share-warrants only a "weighing" takes place and a majority of at least two thirds is required. For the second meeting a simple majority counted only by "weighing" the votes and the representation of the half of the paid up capital will be sufficient, while in the case of share-warrants only the representation of this half of the paid up capital is required.

There is a declaratory provision ⁶ that no new obligations can be imposed upon the shareholders without their consent, but if an amendment of the charter contains regulations affecting, directly or indirectly, the rights of one particular class of shareholders, the assent of the

1. Spanish : "primera convocatoria" and "segunda convocatoria". Cf. supra p.247, note 3.

2. Spanish : "acciones nominativas". 3. Spanish : "acciones al portador".

4. Spanish : " ... dos terceras partes del numero de socios ...".

5. Spanish : " ... del capital desembolsado".

6. Art. 85 (1).

appropriate class meeting is needed and the rules on qualified majority of Art.58 apply to such a class meeting as well ¹.

As in American Law, rights of appraisal ² are to be found, but their applicability is very restricted. They become operative on amendment of the charter but only if the amendment consists of an alteration of the objects of the company : they can then be enforced by those shareholders who have not voted in favour of these amendments ³.

Ten sections are devoted to increase of capital ⁴, and only five to reduction ⁵. Article 88 covers all the possible types of increase : by issue of new shares, by increasing the nominal value of the shares ⁶, by new additions to the property ⁷ of the company, by transformation of the reserves or "super-values" ⁸, or by conversion of debentures into shares. The provision that the previous issues must be fully paid up prior to the issue of a new series is typical of countries where capitalism is not highly developed, and caution in this respect is

1. Art. 85 (2).

2. Cf. supra p. 243. See also : P.J.E(der), "Spain : New Law of Stock Companies", in : "The American Journal of Comparative Law", vol.1 (1952), p.118.

3. Art. 85 (4). This right of appraisal ("derecho de separarse") includes the right to receive a repayment of the value of the shares.

4. Art. 87-96. The expressions "aumento" and "elevación" are both used to express "increase".

5. Art- 97-101. The expressions "reducción" and "disminución" are both used to denote "reduction", though the first one is more common.

6. Spanish : " .. aumento del valor nominal".

7. Spanish : " .. nuevas aportaciones al patrimonio social". This covers an issue for cash, and for any other consideration as well.

8. Spanish : " plusvalías".

accordingly usually found ¹. The unpaid amount of the new issue should not exceed 75% of the nominal value of each subscribed share ². There are provisions about a qualified increase ³. The usual form of issue of new shares is a public subscription, the required contents of a special prospectus ⁴ being given in all details. Pre-emptive rights ⁵ are provided for where the increase is effected by issuing new shares, thus accepting an American idea.

For an increase out of reserves ⁶ two ways are provided : either by way of gratis shares ⁷, or by increase of the nominal amount of the old shares ⁸. For an increase by conversion of debentures ⁹ it is provided that such a conversion should either have been stated at creating that class of shares, or be made with the assent of the affected obligacionista. In this latter case, the value of the issuable shares may not be higher than the value of the convertible debentures , or the difference should be transferred from the reserves or the profits of the company ¹⁰. A possibility of a reduction-cum-increase is also provided for ¹¹. The regulations on authorized capital ¹² are somewhat similar to those in Germany. An increase within the framework of the authorized capital has to be effected not later than five years from the date of the formation, or from the date

1. Art. 89.

2. Art. 90.

3. Art. 90 and Art. 91 (8).

4. Art. 91.

5. Spanish : " derecho a subscribir en la nueva emision".

6. Art. 88 and 94.

7. Sp.: " ..sin exigirles desembolso alguno."

8. Spanish : " .. aumento del valor nominal ..."

9. Art. 88 and 95.

10. Art. 95 (2)(2).

11. Art. 95 (3).

12. Art. 96.

of the amendment of the charter. Such an increase can be made either in one or in a series of actions, but the amount of authorized capital can in no case be higher than the nominal capital at the time of such an authorization.

The provisions on reduction of capital are of an even more accentuated brevity, and the more significant traits may be simply listed as follows : An induciae of three months is provided for, but this applies only to the case of reduction with repayment ¹. As in Swiss Law ² a three-fold publication in the official gazette ³ and in three local periodicals of a larger circulation is obligatory. The creditors are entitled to oppose such a reduction within these three months, unless the company is able to give satisfaction or security ⁴. Such a security is not needed, however, where the whole reduction is effected for the sole reason of re-establishing an equilibrium between the assets of the company and its capital after sustaining losses ⁵. A reduction is considered obligatory where more than two thirds of the capital has been lost ⁶. A re-grouping of the shares in connection with a reduction is provided for ⁷. The company is entitled to exact forfeiture of those shares which were not presented for re-stamping in due time ⁸. The usual practice of selling the new shares, issued instead of those forfeited on behalf of the interested person is provided for ⁹. The institution of a reduction by redemption is also familiar to Spanish Law ¹⁰.

1. Spanish : " ... restitución de sus aportaciones a los accionistas ..."

2. Cf. supra p. 205.

4. Spanish : "garantia".

6. Art. 99 (2).

8. Art.100 (2).

9. Spanish : " ... por cuenta y riesgo de los interesados ...".

3. "Boletín Oficial del Estado".

5. Art. 99 (1).

7. Art.100 : "agrupacion de acciones".

10. Art. 100 (3) and Art. 101.

V . C o m p a r a t i v e S u r v e y .

A remarkable change of attitude towards history became noticeable during the last three centuries ; the trend, which is still accelerating, is towards a universalizing history ¹, and the world, the subject of the historians, is becoming one world. This shrinking of the world, brought about both by speed of travel and by the ever growing sense of the universal community of mankind, has had its parallels in the development of all sciences and doctrines. Einstein's attempts to find a common denominator in the field of mathematics and physics are typical of our age ; and equally so is the awareness of the plurality of forms and the comparability of norms in law and economics. Furthermore, the days of the water-tight-compartment conception have irrevocably passed, and neither a country, nor a continent, nor any branch of life or of knowledge, nor any social science, can now be regarded within the strict precincts of their former precincts.

1. J.B.Bossuet (1627-1704) with his *Discours sur l'histoire Universelle* (1681) was considered as the first philosopher of history. Sir Winston Churchill's *A History of the English Speaking Peoples* (1956 ff.) may in one sense be looked on in the future as a turning point in our conception of history.

But it is still very difficult to say whether comparative law¹ has made any significant development towards a more universal approach to legal phenomena since the days of the French scholar Edouard Lambert² and the address delivered by Lord Macmillan in 1932³. There is one striking feature in common amongst modern philosophers of history and comparative jurists, namely a greater sensitivity to tendencies than to situations⁴. And there are tendencies amongst the jurists themselves which should be noted as possibly facilitating a more fruitful comparative approach, namely, on the one hand, Anglo-American scholars are showing less of their abhorrence of abstractions⁵, notions, principles and theories,

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1. Lit. : P.Arminjon, Baron B.Nolde and M.Wolff, *Traité de droit comparé*, three vol., Paris 1950 - 1952 ; L.Bienaimé and P.Baudoin-Bugnet, *Le code des sociétés anonymes en Europe*, Brussels 1938 ; F. van Calker, "Gesetzgebungspolitik und Rechtsvergleichung", in : "Festschrift Paul Laband gewidmet" (University of Strasbourg), Tübingen 1908, pp.97-118 ; F.David, *La réforme de la législation des sociétés par actions d'après les enseignements du droit comparé*, Paris (s.a.,1942) ; J.Escarra, *Cours de droit commercial complémentaire*, Paris 1948 - 1949 ; J.Escarra, *Cours de législation commerciale comparée*, Paris 1949 ; H.C.Gutteridge, *Comparative Law*, Cambridge 1946 ; W.Hallstein, *Die Aktiengesetze der Gegenwart*, Berlin 1931 ; A.K.Kuhn, *A comparative study of the Law of Corporations*, 3rd ed., two vol., New York 1935 ; Roscoe Pound, "Comparative Law in Space and Time", in : "The American Journal of Comparative Law", vol.4 (1955), pp.70-84 ; R.Quintano, *Diccionario de derecho comparado*, Madrid 1951 ; M.Rivarola, *Sociedades anónimas : estudio juridico-economico de la legislación argentina y comparada*, two vol., Buenos Aires 1924 ; R.B.Schlesinger, *Comparative Law, Cases and Materials*, Brooklyn 1950 ; A.F.Schnitzer, *Vergleichende Rechtslehre*, Basle 1945.
 2. "Recueil d'etudes en l'honneur d'edouard Lambert", three vol., Paris 1937 -1939. Cf. also : H.C.Gutteridge, op.cit., and K.Zweigert, "Rechtsvergleichung als universale Interpretationsmethode", in : ZsAIP, vol.15 (1949), pp. 5 ff.; and "Neue Systeme und Lehrmittel der Rechtsvergleichung", in : ZsAIP, vol.17 (1952),pp.397 ff
 3. Lord Macmillan, "Scots Law as a Subject of Comparative Study", in : "Law and other Things" (Selected essays by Lord Macmillan), Cambridge 1937, pp.102 ff, and in : "Mémoires de l'Academie Internationale de Droit Comparé",vol.II,part 4, Paris 1935.
 4. Roger Caillois, "Illusions in Reverse", in : " Encounter", vol.IV (4) (1956), p.41.
 5. M.Gutzwiller, "Rechtsvergleichung in kontinentaler Sicht", in : "Receuil des travaux suisses présentés au IV-ième Congres International du droit comparé", Geneva 1954, p.6.

and are inclining towards even a sympathy for a "disregard for the utilitarian" ¹, and, on the other hand, continental jurists are abandoning their allegiance to the traditional juridical constructions ², and thereby diminishing the gulf between these two opposite sides.

Commercial and company law are, perhaps, especially suitable for comparative studies, not only owing to their place in the forefront of legal progress but also because of their pragmatic character and economic background, and because different systems have always shown substantial similarity in these matters to a much greater extent than different systems of civil and criminal law ³, where national elements are more preponderant. Any comparative study in this field, though one has to be aware of the inevitable imperfection, may be a help and guide ⁴ if the chance should arise for a recasting of company law in order to improve its style, adaptability and elasticity. It should be stressed, however, that this study has the much more modest aim of showing the trends of development, where that is possible, and of elucidating at least a part of the assembled material.

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1. F.Sewell Bray, "An Accounting Progression", in : " Accounting Research", vol.IV, part 2, Cambridge 1953, p. 143.
 2. The author, in a paper read at the Faculty of Law of the University of Graz in 1944, ("Rechtskritische und rechtsvergleichende Grundzüge zum Problem über Kapitalerhöhung aus Gesellschaftsmitteln") noted (p.2) the remarkable amount of the then recently recorded departures from various doctrines, theories and traditional opinions in all branches of law. This amount has, it is submitted, been increasing ever since.
 3. This point of view is familiar in American theory of law as well. Cf. e.g. A.H.Feller, "The Movement for Corporate Reform : A world-wide phenomenon", in : " American Bar Association Journal", vol.20 (1934),p.347.
 4. Escarra-Rault, vol.I, p. 39 ; and Pic-Kreher, p.194.

Public companies are a relatively recent formation within the framework of company law, and this is, perhaps, the reason why it is not always possible to note trends and tendencies, or not possible to do so yet. However, it is perhaps possible to ascertain some changes of style, content and appearance during the last hundred years, and to an even greater extent, during the last fifty years. It was the intention of this study to denote these lines of development, especially in *A l t e r a t i o n o f C a p i t a l*, but this could not, of course, be done without paying attention to changes in the background, and without considering trends and tendencies observed in connection with *o t h e r* special questions of company law, like membership, allocation of shares, rights of shareholders, and, last but not least, the controversy about the contractual basis and the legal personality of these companies.

The system of dealing with alteration of capital in statute law varies from country to country. In older statutes, as e.g. in Scots and English Law prior to 1867, and in some American states, e.g. in Louisiana, even the possibility of a reduction of capital was not contemplated. The importance attached to the question of the protection of the creditors' interests in the case of a reduction was initially somewhat exaggerated, and, partly owing to this, the provisions on reduction, when entering the statute book, sometimes received more emphasis in the system than the older form of alteration, namely, increase of capital¹. The juxta-

1. Thus, there is quite often a separate division, or sub-division, entitled "Reduction", in some of the systems of law, as e.g. in Scots and English Law (cf. supra pp. 71, 87 and 88), Switzerland, or Liechtenstein, *w i t h o u t* there being at the same time any adequate division or sub-division entitled "Increase".

position of these~~z~~ two types of alteration took place in only a few quite recent statutes, as e.g. in Germany, Sweden and Spain, and was mainly based on a logical analysis of the notion of alteration of capital. It is also worth while noting that there is a textual shortening of the provisions in countries where either the supervision of the investment market is firmly in the hands of a governmental body, or semi-official bodies like stock-exchanges, or capital issues committees ¹, or securities' commissions ², or, concerning reduction of capital, the powers of courts and registrars to investigate a case are not too rigidly circumscribed by provisions on form and procedure ³. The attempt to create a new legal conception, namely, "supply of capital" ⁴, and to consider increase as only one of its forms, was, to the writers knowledge, confined to Germany. A similar idea is found in a chapter entitled "Protection of shareholders and of the share-capital" in the laws of Switzerland and Liechtenstein, and it is, in a way, reminiscent of the departure from the doctrine of the unalterability of capital. This doctrine was, as a matter of fact, much stronger in Swiss Law and jurisprudence than in Germany, the country of its origin.

1. Cf. supra p. 71, note 7. It is submitted that the projected introduction of no-par-value shares (cf. supra p. 22 and p.80, note 4) and a possible abolition of the control exercised by the Capital Issues Committee (cf. L.C.B. Gower, "Some Contrasts between British and American Corporation Law", in : HLR, vol.69, p.1383) may result in a lengthening of the provisions of the Companies Act.

2. Cf. supra p. 220.

3. It is submitted that a shortening of the provisions on reduction may also be visualized in Scots and English Law, since the court's freedom of action has recently grown (cf. supra p. 96) and a number of detailed provisions are merely reminiscences of regulations that were in force and had their meaning at an earlier date.

4. G. : "Kapitalbeschaffung".

The interrelation between alteration of capital and authorized capital was a question familiar to almost all systems of law. In countries where there were less strict regulations concerning the speed of paying up the whole subscribed capital, there was initially very little attention paid to the question of authorized capital, since nobody interpreted the notion "capital" as anything else than the permitted maximum limit of issuable capital ¹. Only in comparison with continental countries, where the official figure of the statutory amount of capital had almost always to be reached within a relatively short period of time, and where it was considered as the "reliable" figure of the paid up capital, did the difference of attitude become apparent. The usual interpretation of authorized capital was to consider it as the maximum limit up to which a company was entitled to increase its capital without setting in motion the formal procedure of amendment of the charter or alteration of capital. Only in a few American states ² and in Liechtenstein ³ are legal minimum figures provided for, thus creating a lower limit up to which a reduction was facilitated. The Law of Liechtenstein even created a sub-type of company based on these two-sided regulations on authorized capital, calling them the variable companies ⁴.

This study has in general dealt only with those alterations of capital which are beyond this framework of authorized capital, though

1. Hallstein, p.181.

2. Cf. supra p.224, note 1, and p. 225. 3. Cf. supra p. 246.

4. G. : "Aktiengesellschaften mit veränderlichem Einlagekapital".

it was unavoidable to mention those regarding which special provisions existed in particular legislatures.

A quite distinct question is that where authority to alter capital should be expressed. Some legislatures deal with it in their companies acts, but there are to be found in many countries statutes which simply leave it to the companies to deal with it in their articles of association ¹ or memorandum ². In a few countries, however, such authorization must be expressed both in the statute law, and in the charter ³.

A resolution in general meeting is the normal mode of expression of the company's wish to alter its capital. There are exceptions to this rule, however. In rare cases the approval of shareholders ⁴ may be obtained individually without their being convened to a meeting ⁵. Another exception would be the provision that the power of authorization of an alteration could generally (i.e. not only within the framework of the authorized capital) be delegated to the board of directors ⁶. It is seldom nowadays that there are special provisions about the type of general meeting where such questions could appear on the agenda, but there are still a few states where alter-

1. Cf. supra pp. 72-73.

2. Cf. supra p. 223, note 7.

3. E.g. in a few American states.

4. Cf. supra p. 226.

5. This variety could, perhaps, be called "an off-meeting collection of shareholders' approvals".

6. E.g. in some cases in California.

ation of capital is within the power of an extraordinary general meeting ¹. Sometimes two general meetings are required to deal with these questions ². In a few states an additional permit or "concession" to alter the capital has to be obtained from a state authority ³, sometimes even prior to the resolution in general meeting.

Special statutory provisions exist about the quorum and majority required in these general meetings to pass resolutions on alteration of capital, but there is a noticeable trend to abolish quorum requirements altogether ⁴, and to diminish the required majorities ⁵, though in only very few countries the majority requirement is exactly the same as for any other resolution in general meeting ⁶. The usual way of counting any majority of votes is by "weighing" them according to the value of the shares they represent, but a considerable number of exceptions from this rule are found in various countries, either in their statutes, or in the charters. There are regulations which, firstly, limit the accumulation of votes, secondly, introduce a double counting ⁷, thirdly,

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1. Thus, e.g. in Belgium (cf. supra p. 139), and, concerning the "first" meeting, in France.
 2. E.g. in France, Luxembourg, Sweden and Spain.
 3. Cf. supra p. 71, note 7, and pp. 131 and 209.
 4. A relatively high quorum (coupled with a simple majority) is required in Italian Law ; a quorum is provided for in Swiss Law (cf. supra p. 200) ; and a quorum, coupled with a majority, in the law of Liechtenstein (cf. supra p. 247).
 5. Statutory requirements of unanimity or very large majority (e.g. of nine tenths) are extremely rare nowadays, though they are still on the statute books in Belgium and Sweden (cf. supra pp. 139 and 261).
 6. E.g. in the provisions of Scots and English Law relating to increase, and in the laws of a number of states in U.S.A.
 7. The law of Luxembourg provides for a presumption of absent voters voting partly in favour of the board's proposals (cf. supra p. 147). Spanish Law provides for an additional counting of shareholders' votes without any "weighing".

give an equal vote to all shares irrespective of their value ¹. In the case of a multifirmity of shares, the passing of the resolution in all the class-meetings, or in all the class-meetings of affected classes only, is usually required in addition, and very often prior to the general meeting dealing with this question.

There are a few systems of law which link the first alteration of capital with some requirement of time, either facilitating an alteration in the early stages, or restricting it, or, even, forbidding it during the first years of the existence of a company ². Another limiting factor in the alteration of capital may be the prescribing of minimum amounts for shares and capital in the case of reduction ³, and, much less frequently, maximum amounts in the case of increase ⁴.

A very much discussed question is that of how alteration of capital is to be effected. While the issue of new shares is still the favourite method of increase, an alteration of the nominal amount of each share seems to be the basic method of reduction ; but both methods now extend almost evenly to both increase and reduction ⁵. Though there are still a number of states where increase of capital by increasing the nominal

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1. E.g. in Switzerland (cf. supra p. 201, note 3).
 2. The company law of Norway provided that no increase be undertaken prior to the registration of the company.
 3. Nominal minimum amounts for a share are provided for in a few states of America and partly in France (cf. supra p. 131). Nominal minimum amounts for the whole capital are provided for in Germany (cf. supra pp. 158 and 177), Switzerland (cf. supra p. 203 and note 2), Italy (cf. supra pp. 209 and 213), and in a very few of the states of America (cf. supra p. 241).
 4. E.g. in Pennsylvania (cf. supra p. 224, note 1).
 5. The general impression to be drawn is that the provisions of the statutes relating to reduction (about the method that should be applied, i.e. diminution of the nominal amount, or cancellation, or otherwise), are much less detailed than those relating to increase of capital (cf. supra pp. 91, 173 and 203).

amount of the shares finds no place in the statute book ¹, or where such increase is considered as admissible only by virtue of a very liberal interpretation ², nevertheless those states which have enacted company law in recent years are now on the whole familiar with this method ³. Parallel to this development goes the diminishing application of the analogy between formation of a company and increase of capital ⁴. Whereas increase by issuing new shares was very often considered in theory as a type of re-formation ⁵ of a company, the other method, i.e. increase by increasing the nominal value of the shares, appeared less suitable for the construction of such an analogy ⁶. The idea of considering any alteration, either increase or reduction, as a form of amendment of the charter is still widely accepted, and cross-references to the general provisions on amendment of the charter are to be found in various companies acts ⁷.

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1. E.g. in Scots and English Law (cf. supra pp. 74-75), but also in France, Belgium, Luxembourg, and, oddly enough, in Liechtenstein.
 2. E.g. in Germany (cf. supra pp. 153 and 160) and in Sweden (cf. supra pp. 252 and 255).
 3. E.g. in Switzerland (cf. supra p. 195), Italy (cf. supra p. 210), America (cf. supra p. 224) and Spain (cf. supra pp. 269-270).
 4. The construction of such an analogy was, of course, alien to Scots and English Law (cf. supra p. 80), but it is still a live idea in the jurisprudence of France and Switzerland, although lately criticized (cf. supra pp. 131 and 196). It is, besides, generally recognized in Belgium (cf. supra p. 139) and also, though only partly, in Germany (cf. supra p. 156).
 5. G. : "partielle Neugründung". This interpretation was, besides, very popular in France and in the pre-soviet law of Poland.
 6. It is not, perhaps, just a coincidence that in almost all countries (e.g. America, Italy and Spain) fully recognizing the method of increase of capital by increasing the nominal value of the shares, the analogy between formation and increase has ceased to play any part.
 7. E.g. in Germany (cf. supra pp. 156 and 160) and in Switzerland (cf. supra pp. 196-197).

As for increase of capital, much attention has been paid in statute law to the question of whether and, if so, how far the previous amount of capital has to be paid up. In a number of countries this question is practically non-existent ¹, but in others an increase may be declared invalid if the previous capital has not been fully ², or almost fully ³, paid up.

One of the central questions within the framework of this study is that of whether and, if so, in what form, p r e - e m p t i v e rights⁴ of shareholders and other persons ⁵ to subscribe for new shares are recognized by statute. In Anglo-American Law the trend is somewhat on the decline. There, the sedes materiae of the principle was to be found either in the common law, or in companies acts of older origin ⁶; and

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1. E.g. in Scots and English Law (cf. supra pp. 76-77), in Switzerland (cf. supra p. 197)(, and in Liechtenstein and America.
 2. E.g. Finland, Spain and France (cf. supra p.133), Austria (prior to 1938), China (prior to 1949), Latvia (prior to 1940), Liechtenstein (prior to 1926), and in the pre-soviet laws of Bulgaria and Hungary.
 3. E.g. Germany under the former law ("HGB"). Cf. supra p. 161.
 4. Cf. F. de Sola Canizares, "The rights of shareholders", in : ICLQ, vol.2 (1953), part 4, pp. 572 ff.
 5. E.g. holders of convertible bonds (America, Liechtenstein, Switzerland). In a very few systems of law (e.g. in the pre-soviet law of Latvia) there was a provision that a l l shareholders have a "second-hand" pre-emptive right to subscribe for those shares which had not been already taken when those shareholders, who were entitled to subscribe proportionally to their respective holdings, were asked to subscribe.
 6. E.g. in Scots and English Law up to 1862 (cf. supra p.78), and in almost all the American states.

later it was either relegated to the official "TableA" ¹, or left entirely to explicit provisions in the individual charter ². On the other hand, the continental systems of law, initially unfamiliar with this institution, have started to introduce it, and the trend there is still increasing ³. It is submitted ⁴ that the lessening of the stress on these rights, as observed in this country and in a few American states, is in line with the general lessening of emphasis on 'the shareholders' status as members. However, it is perhaps still too early to assert that this trend may affect the second group too, i.e. those countries which have only recently become familiar with the institution. If so, one could then perhaps say that it illustrates the process of movement of the whole body of public companies towards a detachment from their "human" base ⁵. There are various limitations of these pre-emptive rights provided for in different countries, e.g. exclusion altogether in the case of preference shares ⁶, or in the case of a qualified increase ⁷.

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1. Up to 1948 in Great Britain, and still in Northern Ireland (cf. supra p.77,note 4).
2. In Scots and English Law since 1948, and in a few American states (e.g.in Indiana and Pennsylvania). A similar attitude is observed in Belgium and Luxembourg (cf. supra p. 141).
3. E.g. France (since 1935 only), Germany, Italy, Liechtenstein, Spain (since 1951 only), Sweden and Switzerland.
4. Cf. supra p. 57.
5. Cf. supra p. 31.
6. E.g. Hungary, Italy, Lithuania, Poland, Sweden and Turkey.
7. E.g. America and Italy.

Another institution has attained universal recognition during the last fifty years, namely, qualified increase of capital. The initially widespread opposition ¹ to increase for considerations other than cash has given way, and not only is its admissibility recognized in principle, but in practice more or less detailed statutory provisions can be found in almost all systems of law. The issue of bonus or gratis shares ² out of surplus, or, as the Americans say, the payment of "stock dividends" ³, is nowadays one of the most popular methods of a qualified increase ⁴.

On the other hand, a still very controversial point is the question of no-par-value shares ⁵. Though the interest in this question has somewhat diminished in America ⁶, it is nevertheless a typical American invention ⁷. It was introduced into Belgium, Liechtenstein and Luxembourg ⁸, and there is a very strong feeling that it may become part of Scots and English Law too ⁹, though there are still warning voices raised against its introduction into Britain. About ten years ago the opinion was ventured by

1. The often quoted work by the late Professor K.Rauch (*Kapitalerhöhung aus Gesellschaftsmitteln*, two vol., Graz 1947/50) is, perhaps, the best, though sometimes one-sided contribution to this question. See also the critical notes on this work by E.J.Cohn (in : *LQR*, vol.62, pp.126-127) and a Swiss jurist H.Reichwein (in : *ZsAIP*, vol.17, pp.698 ff.).

2. Cf. supra p. 83, note 1.

3. Cf. supra pp. 231 ff.

4. E.g. in France (cf. supra p. 132), Belgium (cf. supra p.142), Luxembourg, Germany, Switzerland (cf. supra p. 195), Italy (cf. supra p. 210), Liechtenstein (cf. supra pp.247-248) and Sweden (cf. supra p. 255).

5. Levy, vol.II, pp.596-602.

6. Cf. supra p. 228, note 2.

7. Arminjon-Nolde-Wolff, vol.II, p.597.

8. This institution was also familiar in Italy, though it never was a very popular one.

9. Cf. supra p. 80, note 4.

Professor LCB.Gower expressed recently ("Some Contrasts between British and American Corporation Law", in : *HLR*, vol.69, p.1400) the hope "that this slur will be soon be removed" and no-par-value shares legalized.

American jurists¹ that this institution has lost its importance and its actuality. It was submitted by some authors that this institution tended to indicate a reluctance to push forward with the "de-humanisation" of the legal entity called "public company"², since it was considered as strengthening the "stock-ownership" relations between the members³. It is submitted that the introduction of this rule regarding no-par-value shares may have some practical advantages in countries with an unstable currency, and in order to avoid the expense of re-docketting the share documents.

There is no international uniformity either in the question of whether a full subscription⁴ to the new shares is obligatory, or under what circumstances an incomplete subscription is considered as binding. The principle of full subscription, meaning that any incomplete subscription is invalid, originates, it is thought, from French Law⁵, though in France and in Luxembourg a slight lessening of the rigidity of this principle was noticeable. In other countries, however, it is still quite strictly observed⁷. Anglo-American Law is unfamiliar with this rule⁸, and since the laws of Liechtenstein and Spain are also silent in this respect, and that of Sweden provides for the possibility of fixing a binding minimum⁹, it is tempting to assert that this has been done owing to American impact.

1. C.L.Israels, "Problems of par and no par shares : a reappraisal", in : CLR, vol.47, p.1300.

2. Cf. supra p. 32.

3. Buchanan, p. 98.

4. ~~Fr.~~ Fr. : "souscription integrale".

5. Cf. supra p. 132.

7. E.g. Belgium (cf. supra p.140, note 4), Holand, Italy (cf. supra p.211), Norway.

8. Cf. supra pp.80, 132 and 235.

9. Cf. supra p. 257.

There are sometimes differences in the procedure for passing general meeting resolutions to reduce capital ¹, though generally the rules are the same, i.e. the same majority and quorum, and the same attitude towards reduction as a form and variety of a charter amendment ². There are still, however, some countries left, where there are practically no statutory provisions at all ³, and in Chile any reduction was strictly forbidden.

Provisions on reduction were initially dominated by the idea of protection of the creditors' interests, which was considered the most essential obligation of the company and of the supervising state as well ⁴. The complexity of various statutory provisions ⁵ on this question is mainly due to this consideration. It was only more or less recently that the court's freedom of action in some countries was raised ⁶ up to a point where the court acquired the rights to decide whether to apply a special procedure provided for the protection of the creditors' interests. This rule is really an achievement of legal technique, and it is submitted that it may lead to a textual simplification of the statutory provisions

1. E.g. a three-quarters majority is required under Scots and English Law (cf. supra p.90 and note 3) ; no extraordinary meeting is required under French Law (cf. supra p.134) ; the attendance of the representative of the Ministry of Finance was "made possible" in the pre-soviet law of Lithuania ; but the attendance of the representative of a neutral body of approved auditors is obligatory in Switzerland (cf. supra pp. 204-205) ; in some countries, e.g. in Belgium, the method of reduction has to be specified in the notice calling a general meeting.

2. E.g. in Belgium, Italy, Spain. 3. E.g. in Persia.

4. The emphasis on the protection of the creditors' interests is comparatively much smaller in America (cf. supra p. 239). Other systems of law, as e.g. Italian Law, provide that the court may overrule the opposition of creditors (cf. supra p.213). Cf.also Hallstein, p.192.

5. Cf. e.g. supra p. 174.

6. E.g. in Scots and English Law (cf. supra pp. 96 ff.).

on reduction¹. As a matter of fact, later legislations showed in many cases a shortened version of the statutory provisions on reduction². The consideration that complex provisions regulating this question are of no great avail, and that a flexible provision on the permissibility of demanding, and n o t the obligation of demanding security, or satisfaction, or guarantee for the benefit of the creditors may be much more advantageous has³, perhaps, influenced this trend. The practice of an agreement with the creditors⁴ may also have helped to dethrone the old-fashioned complex rules on reduction.

A wide spread institution within the procedure of reduction, though unknown in Britain and almost unknown in America, is that of an induciae, i.e. a space of time before the expiry of which no payments of dividends or repayments of capital to the shareholders are allowed, all creditors' claims should be filed and settled, and a final filing of the reduction with the registrar should not be made. This institution, which is apparently of German origin⁵, is now accepted in the majority of legal systems⁶.

Reduction shows more structural changes than increase, though on the whole it is impossible yet to say that there are any universal trends of develop-

1. Cf. supra p. 97, note 3. The inapplicability of the "Order L III B" in Scotland (cf. supra p. 98, note 2, and infra p. A 19) means that Scots Law on reduction is considerably simpler than English Law, though, of course, the court's right not to apply the special procedure laid down in s.56 (2) of the Companies Act somewhat overcomes this difference between the two systems.

2. This trend is noticeable in Switzerland (cf. supra p.201), Italy (cf. supra p.211), America (cf. supra p.236), Liechtenstein (cf. supra p.249), Sweden (cf. supra p.262) and Spain (cf. supra pp. 269 and 271).

3. Cf. supra pp.99-100, 174-175, 206-207, 213.

4. Cf. supra pp. 143 and 207.

5. Cf. supra p.158.

6. E.g. in Belgium (cf. supra p.143), Germany (cf. supra p.175), Switzerland (cf. supra p.206), Italy (cf. supra p.213), Liechtenstein (cf. supra p.249), Sweden (cf. supra p.264) and Spain (cf. supra p. 271).

ment. One thing is certain, perhaps, and that is that there are some types of shortened or simplified reduction¹ provided for in various legislations, and that this trend may influence future legislation and future practice too, and even replace the old "normal" procedure of reduction. One of the types of reduction which has acquired some universal application and has, owing to its frequency, developed into an almost separate institution of modern company law, is reduction by redemption². Much attention has also been given to the relationship between reduction and liability. Readjustment as a type of alteration has acquired some importance in countries with a not too reliable currency system³. It usually takes form of special legislation⁴ in order to re-arrange capital figures after a heavy inflation has upset the whole system of corporate capitalization. There is only one case, however, where provision far in advance for such a possibility has been made⁵, and it is to the effect that the situation, when it arose, could be dealt with without any further legislation.

1. Cf. supra pp. 178-181, and p. 239.

It is submitted that in this country the freedom of the court to decide whether to apply the complex procedure laid down in s.56 (2) of the Companies Act of 1948 is in itself a simplified form of a reduction of capital.

2. In Scots and English Law, it is known under the name of "reduction of the redemption reserve fund" (cf. supra pp. 87, 94 and 111 ff.), in America usually called "cancellation of shares by redemption" (cf. supra pp. 237 ff.). This institution is, besides widely applied in Germany (cf. supra pp. 173 and 182), Sweden (cf. supra p. 262) and Spain (cf. supra p. 271).

3. France (cf. supra pp. 136-137), Belgium (cf. supra p. 142), Germany (cf. supra pp. 183 ff.).

The American term "readjustment of stock" has a distinctly different meaning (cf. supra p. 61, note 1, and p. 243).

4. Cf. supra p. 183, note 2.

5. Liechtenstein (cf. supra p. 248 and note 2).

While most persons would doubtless agree that in a capitalistic economy the aim of business corporations is to secure the maximum possible net return, this does not apply so fully to public companies where considerations of national economy are as important as those of private profit¹. Neither is it generally recognized ~~recognized~~ or appreciated that almost the only way of measuring the achievements of individual enterprises is by the use of methods of accounting².

The interrelation between the subject of this study and the methodological approach of the accountant is very complex. Accounting methods and accounting concepts may be adapted to the individual purpose of practically any case. There is a rivalry between modern law which introduced accounting concepts into the statutes, and modern accountancy, each trying to outwit the other for the benefit of their customers. Attempts, however, have been made, especially in Switzerland, to neutralize the accountant, and make impartiality and objectivity essential features of his opinion and choice of methods.

As a by-product of these trends arguments on accounting matters have almost reached the stage of litis contestatio. It may be that finally it will be deplored that accounting has entered the legal and juridical precincts, but, on the other hand, it may be submitted that this was

1. Cf. supra pp. 21 and 36.

2. A.A.Berle, Jr., and F.S.Fischer, "Elements of the Law of Business Accounting", in : CLR, vol.32 (1932), pp. 573-600 ; N.S.Buchanan, The Economics of Corporate Enterprise, New York 1940 ; E.Folliet, Le bilan dans les sociétés anonymes au point de vue juridique et comptable, Lausanne 1920, pp. 98 ff.; W.G.Katz, "Accounting problems in corporate distributions", in : "University of Pennsylvania Law Review", vol.89 (1941), pp. 764-788.

inevitable since it followed the general trend of formalism that has entered all branches of social life.

The advent of public companies as instruments of high economic policy of a planning state may lead to the need for a public official entitled or obliged to look deeper into the business life of such companies, and to do that vigilantly not only from the point of view of controlling the legality of its transactions, but also with a view to checking the accounting methods applied to them. The battle of wits in concepts and motives will naturally enough become the leading factor in accounting matters too. It is yet quite impossible to predict what methods and arguments will be brought forward on either side. However, one may assert already that planning states are usually more interested in prescribing detailed principles of accounting, although this might hardly be advantageous for private initiative. .

Questions about limited companies and their capital, and, especially, about a l t e r a t i o n of their capital led to legalistic constructions inundating the science of accounting, and to balance sheet requirements being transferred to the statute book ¹. The "capital of a company", introduced for the first time in a balance sheet as an invariable number, had in every respect a quite different meaning some fifty years ago. The rather fluid and elastic principles of balance keeping became somewhat distorted under the influence of the rigidly and formally unalterable number called capital. Compared with other items on the same balance

1. Rauch. vol.I, pp. 1-2.

sheet, this new notion of capital was much less real, especially in countries with emphasis on the unalterability of capital and lacking the institution of authorized capital.

This is not the only reason why it may be thought that the less accounting matters enter statute law, the better for the interests of accountancy. It is also an advantage, in the writer's opinion, that standards of uniformity are kept at a minimum in the Companies Act of 1948 ¹, since an abundance of detail would inevitably lead to a rampant formalism and cause a spiral of arguments. Accounting may have become a healthy and important brake on the process of de-humanization ² of the economic life of a competitive planning state.

It is the duty of the legislature to find out the best possible synthesis of the requirements of the state and of those of private initiative, and this applies to the field of public companies as well.

The practical value of accounting theory ³ and of theoretical maxims of jurisprudence, as applied to company law, becomes apparent in this connection. Sociological aspects become an essential element in the process of judging any situation, or any trend. Economists in the borderland between economics and accounting, jurists in the borderland

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1. F.Sewell Bray, *Four Essays in Accounting Theory*, London 1953, p.19.
Professor Bray recommends in another place (*ibid.*, p.31) that company legislation should not attempt to define an account.
 2. Cf. supra pp. 31-32 and pp. 284-285.
 3. Cf. the studies by F.Sewell Bray : *The Accounting Mission*, Melbourne 1951, and *Four Essays in Accounting Theory*, London 1953.

between law and applied economics, and accountants familiar with company law may become the ideal set of people to correlate tendencies within these doctrines. There is inevitably an interconnection between currency policy, the general balance of payments in a state, and the state's interest in controlling the investment activities of its citizens and legal entities.

In all the cases of alteration of capital accounting methods and accounting concepts are of great importance, and there is fertile ground for argument on points of advisability of altering the capital, checking the accuracy of an alteration scheme, or checking a completed alteration. The interests of the shareholders, of classes and groups of shareholders, of directors and the management, of the company accountants and book-keepers¹ and, last but not least, of the planning, or simply controlling, state may be, and very often are, in conflict.

The impact of accounting on statute law does not always affect public and private companies equally, and one may even visualize the existence of a special public company accountancy². It may even be asserted that the process of nationalization of enterprises, either in otherwise capitalistic countries, or in countries of socialistic or soviet character, always brings

1. They are, of course, and quite naturally, primarily concerned with the interests of their employer - the public company. Cf. F.Sewell Bray, *Four Essays in Accounting Theory*, London 1953, pp. 31-32.

2. F.Sewell Bray, *op.cit.*, pp. 16 - 17 ; and F.Sewell Bray, "The Formal Principles of Public Company Accounting", in : "Accounting Research", vol.IV (4), Cambridge 1953.

growing accountancy obligations with it ¹. It may be advantageous for the art, science and theory of accountancy ² to keep accounting matters out of the statute book as much as possible, since the danger that it may easily enough become a "legal constraint" ³ is quite possible too. The emphasis on the impartiality of the public or social accountant ⁴, entitled or obliged to look into an internal matter of alteration of capital, as we observe it in Swiss Law⁵, may be advantageous in order to keep the whole class of public companies on a "lower" level ⁶ of the companies' pyramid.

Of the individual questions dealt with in this study, there should again be mentioned the institution of no-par-value shares as a means to bridge over the discrepancy between nominal and real values ⁷, and to ease an individual alteration of capital within the flux of general currency values. No-par-value shares may even become obligatory during

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1. It is submitted that it is not the "privilege of limited liability" (an opinion expressed by Professor Bray, Four Essays in Accounting Theory, p. 17) that is decisive and responsible for the existing emphasis on accountancy, but simply the presence of the public interest. The public character of any public company is the point. The writer agrees otherwise with Professor F.Sewell Bray that some of the private companies may be very near to the higher level of public companies.
 2. F.Sewell Bray, The Accounting Mission, pp. 28 and 59.
 3. F.Sewell Bray, " The Formal Principles of Public Company Accounting", p.10.
 4. F.Sewell Bray, The Accounting Mission, pp. 18 ff., and p. 60.
 5. Cf. supra pp. 204-205, and p. 286, note 1.
 6. Cf. supra p.190.
 7. "Actual market valuation" (a rather objective category) and "time delay" (as an internal policy of an individual company) are only two illustrations of the futility of the "reality" of any values. Cf.F.Sewell Bray, The Accounting Mission, p.32.

periods when inflationary trends are a threat to the economy of a state, and accountancy should be aware of this possible trend, since the "Accounting implications of changing money values" are and always have been a burning question ¹.

Another question which is dealt with in accounting theory is that of capital surplus adjustments ² as a pre-condition of an increase out of surplus. Too strict and too formal statutory provisions on revaluation and depreciation ³, though designed to achieve accuracy and efficiency, may easily enough become a handicap and lead to new interpretative struggles of arguments.

Summing up, it could, of course, be said that difficulties will inevitably arise in studies of this nature. If, other things being equal, two men are theoretically unable to see the same object with the same eye, then, when the other things are not equal, e.g. nationality, race, language, creed, background and philosophical approach, it is even less likely that similar results will be achieved when investigating comparative law. Any comparative study can be only an essay of comparison, and other writers may notice and select other peculiarities, stress different aspects and reach other conclusions.

While individualistic elements were in the foreground in older companies acts, the general trend towards collectivism was bound to

1. F.Sewell Bray, "The Accounting Progression", in : "Accounting Research", vol.IV (4), Cambridge 1953, p. 141.

2. F.Sewell Bray, The Accounting Mission, pp. 44 ff.

3. F.Sewell Bray, Four Essays in Accounting Theory, pp. 30 ff.

affect modern company law. This has become apparent ¹ every time a revision of company law has taken place lately, though the amount and style of its accentuation differed from country to country. The totalitarian countries experimented shortly before the Second World War with a complete divergence from individualism towards the protection of the interests of the whole economy. Other states continued to follow the classical lines of a democracy and tried to repair inadequacies by delicate measuring of needs and possibilities ², by manoeuvring through the gulf between over-individuality and trans-personality, and by somewhat slowing down the amount of protection of the individual rights of shareholders and creditors.

From the point of view of pure jurisprudence, it has to be borne in mind that countries with a Roman Law tradition were much more fortunate than others in finding available a good and short form of legal expression concerning even these so technically mercantile questions. On the other hand, the verbosity of the companies acts of German origin has not proved to be an asset, though these acts are doubtless pregnant with good logic and accuracy of thought, and though they are possibly the best representatives of subtle achievement in the transcendental world of juridical conceptionalism ³. In the long run these companies acts were not greatly favoured, and can hardly be considered as good specimens of legislative

1. E. Bossard, *Die Reserven der Aktiengesellschaft im neuen Obligationenrecht*, Berne 1940, pp. 58-59.

2. *Ibid.*, p. 74.

3. M. Gutzwiller, "Rechtsvergleichung in kontinentaler Sicht", in: "Recueil de travaux suisses présentés au IV-ième Congrès International du Droit Comparé", Geneva 1954, p. 8.

creations. Swiss Law has given an extraordinary good example of aloof criticism of German achievements in legal matters. It may have been very tempting for the Swiss to copy them more, especially in the psychological atmosphere of the late thirties. The tempered acceptance of American ideas in Liechtenstein and Spain could be counterbalanced by that in Sweden, where no Roman Law traditions have helped to filter the impact of the law of the most capitalistic country in the whole world.

It is submitted that, concerning Scots Law, Roman Law traditions were again providential on at least two occasions in the past hundred years : firstly, in the return to legal traditions that were familiar in Scotland prior to 1856 - this happened in the sixties of the last century ¹, and secondly, in the non-acceptance of the "Order L III B" in Scotland ².

1. Cf. supra p. 69.

2. Cf. supra p. 98 and note 2, and p. 287, note 1.

ANNEXES.

THE UNITED STATES OF AMERICA, 1861-1865

CHAPTER I.

The text is given back in some instances of passages which have been altered in the original.

The numbers of pages and articles referred to in the text are given in the margin of the original.

The numbers of sections and articles which are no longer in the original are given in the margin of the original.

The original text is given in the margin of the original.

LIST OF ABBREVIATIONS USED IN THE TEXT.

Cap. 1861	1861-1862
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Cap. 1876	1876-1877
Cap. 1877	1877-1878
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Cap. 1914	1914-1915
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Cap. 2007	2007-2008
Cap. 2008	2008-2009
Cap. 2009	2009-2010
Cap. 2010	2010-2011
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Cap. 2017	2017-2018
Cap. 2018	2018-2019
Cap. 2019	2019-2020
Cap. 2020	2020-2021
Cap. 2021	2021-2022
Cap. 2022	2022-2023
Cap. 2023	2023-2024
Cap. 2024	2024-2025
Cap. 2025	2025-2026
Cap. 2026	2026-2027
Cap. 2027	2027-2028
Cap. 2028	2028-2029
Cap. 2029	2029-2030
Cap. 2030	2030-2031
Cap. 2031	2031-2032
Cap. 2032	2032-2033
Cap. 2033	2033-2034
Cap. 2034	2034-2035
Cap. 2035	2035-2036
Cap. 2036	2036-2037
Cap. 2037	2037-2038
Cap. 2038	2038-2039
Cap. 2039	2039-2040
Cap. 2040	2040-2041
Cap. 2041	2041-2042
Cap. 2042	2042-2043
Cap. 2043	2043-2044
Cap. 2044	2044-2045
Cap. 2045	2045-2046
Cap. 2046	2046-2047
Cap. 2047	2047-2048
Cap. 2048	2048-2049
Cap. 2049	2049-2050
Cap. 2050	2050-2051
Cap. 2051	2051-2052
Cap. 2052	2052-2053
Cap. 2053	2053-2054
Cap. 2054	2054-2055
Cap. 2055	2055-2056
Cap. 2056	2056-2057
Cap. 2057	2057-2058
Cap. 2058	2058-2059
Cap. 2059	2059-2060
Cap. 2060	2060-2061
Cap. 2061	2061-2062
Cap. 2062	2062-2063
Cap. 2063	2063-2064
Cap. 2064	2064-2065
Cap. 2065	2065-2066
Cap. 2066	2066-2067
Cap. 2067	2067-2068
Cap. 2068	2068-2069
Cap. 2069	2069-2070
Cap. 2070	2070-2071
Cap. 2071	2071-2072
Cap. 2072	2072-2073
Cap. 2073	2073-2074
Cap. 2074	2074-2075
Cap. 2075	2075-2076
Cap. 2076	2076-2077
Cap. 2077	2077-2078
Cap. 2078	2078-2079
Cap. 2079	2079-2080
Cap. 2080	2080-2081
Cap. 2081	2081-2082
Cap. 2082	2082-2083
Cap. 2083	2083-2084
Cap. 2084	2084-2085
Cap. 2085	2085-2086
Cap. 2086	2086-2087
Cap. 2087	2087-2088
Cap. 2088	2088-2089
Cap. 2089	2089-2090
Cap. 2090	2090-2091
Cap. 2091	2091-2092
Cap. 2092	2092-2093
Cap. 2093	2093-2094
Cap. 2094	2094-2095
Cap. 2095	2095-2096
Cap. 2096	2096-2097
Cap. 2097	2097-2098
Cap. 2098	2098-2099
Cap. 2099	2099-2100
Cap. 2100	2100-2101
Cap. 2101	2101-2102
Cap. 2102	2102-2103
Cap. 2103	2103-2104
Cap. 2104	2104-2105
Cap. 2105	2105-2106
Cap. 2106	2106-2107
Cap. 2107	2107-2108
Cap. 2108	2108-2109
Cap. 2109	2109-2110
Cap. 2110	2110-2111
Cap. 2111	2111-2112
Cap. 2112	2112-2113
Cap. 2113	2113-2114
Cap. 2114	2114-2115
Cap. 2115	2115-2116
Cap. 2116	2116-2117
Cap. 2117	2117-2118
Cap. 2118	2118-2119
Cap. 2119	2119-2120
Cap. 2120	2120-2121
Cap. 2121	2121-2122
Cap. 2122	2122-2123
Cap. 2123	2123-2124
Cap. 2124	2124-2125
Cap. 2125	2125-2126
Cap. 2126	2126-2127
Cap. 2127	2127-2128
Cap. 2128	2128-2129
Cap. 2129	2129-2130
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Cap. 2131	2131-2132
Cap. 2132	2132-2133
Cap. 2133	2133-2134
Cap. 2134	2134-2135
Cap. 2135	2135-2136
Cap. 2136	2136-2137
Cap. 2137	2137-2138
Cap. 2138	2138-2139
Cap. 2139	2139-2140
Cap. 2140	2140-2141
Cap. 2141	2141-2142
Cap. 2142	2142-2143
Cap. 2143	2143-2144
Cap. 2144	2144-2145
Cap. 2145	2145-2146
Cap. 2146	2146-2147
Cap. 2147	2147-2148
Cap. 2148	2148-2149
Cap. 2149	2149-2150
Cap. 2150	2150-2151
Cap. 2151	2151-2152
Cap. 2152	2152-2153
Cap. 2153	2153-2154
Cap. 2154	2154-2155
Cap. 2155	2155-2156
Cap. 2156	2156-2157
Cap. 2157	2157-2158
Cap. 2158	2158-2159
Cap. 2159	2159-2160
Cap. 2160	2160-2161
Cap. 2161	2161-2162
Cap. 2162	2162-2163
Cap. 2163	2163-2164
Cap. 2164	2164-2165
Cap. 2165	2165-2166
Cap. 2166	2166-2167
Cap. 2167	2167-2168
Cap. 2168	2168-2169
Cap. 2169	2169-2170
Cap. 2170	2170-2171
Cap. 2171	2171-2172
Cap. 2172	2172-2173
Cap. 2173	2173-2174
Cap. 2174	2174-2175
Cap. 2175	2175-2176
Cap. 2176	2176-2177
Cap. 2177	2177-2178
Cap. 2178	2178-2179
Cap. 2179	2179-2180
Cap. 2180	2180-2181
Cap. 2181	2181-2182
Cap. 2182	2182-2183
Cap. 2183	2183-2184
Cap. 2184	2184-2185
Cap. 2185	2185-2186
Cap. 2186	2186-2187
Cap. 2187	2187-2188
Cap. 2188	2188-2189
Cap. 2189	2189-2190
Cap. 2190	2190-2191
Cap. 2191	2191-2192
Cap. 2192	2192-2193
Cap. 2193	2193-2194
Cap. 2194	2194-2195
Cap. 2195	2195-2196
Cap. 2196	2196-2197
Cap. 2197	2197-2198
Cap. 2198	2198-2199
Cap. 2199	2199-2200
Cap. 2200	2200-2201
Cap. 2201	2201-2202
Cap. 2202	2202-2203
Cap. 2203	2203-2204
Cap. 2204	2204-2205
Cap. 2205	2205-2206
Cap. 2206	2206-2207
Cap. 2207	2207-2208
Cap. 2208	2208-2209
Cap. 2209	2209-2210
Cap. 2210	2210-2211
Cap. 2211	2211-2212
Cap. 2212	2212-2213
Cap. 2213	2213-2214
Cap. 2214	2214-2215
Cap. 2215	2215-2216
Cap. 2216	2216-2217
Cap. 2217	2217-2218
Cap. 2218	2218-2219
Cap. 2219	2219-2220
Cap. 2220	2220-2221
Cap. 2221	2221-2222
Cap. 2222	2222-2223
Cap. 2223	2223-2224
Cap. 2224	2224-2225
Cap. 2225	2225-2226
Cap. 2226	2226-2227
Cap. 2227	2227-2228
Cap. 2228	2228-2229
Cap. 2229	2229-2230
Cap. 2230	2230-2231
Cap. 2231	2231-2232
Cap. 2232	2232-2233
Cap. 2233	2233-2234
Cap. 2234	2234-223

A N N E X I .

Provisions relating to A l t e r a t i o n o f C a p i t a l
in the C o m p a n i e s A c t s 1862 - 1948 of the United
Kingdom .

The text is given here of those sections of Companies Acts which deal with the problem of alteration of capital.
The numeration of sections and articles refers to the Companies Act of 1948. The numbers of identical or corresponding sections and articles of prior Companies Acts are given on the margin.
The numbers of sections and articles which are no longer in force are bracketed, their text being given in footnotes if of some importance for this study. Single words and phrases omitted in later Acts are also bracketed. A footnote is appended.
The uplifted sign (indicates the beginning of a text dealt with or referred to in the next footnote.

List of abbreviations used to denote the
different British Statutes :

C.A.1862	25 and 26 Vict., cap. 89,
C.A.1867	30 and 31 Vict., cap.131,
C.A.1877	40 and 41 Vict., cap. 26,
C.A.1879	42 and 43 Vict., cap. 76,
C.A.1880	43 Vict., cap.19,
C.A.1890	53 and 54 Vict., cap. 63,
C.A.1900	63 and 64 Vict., cap. 48,
C.A.1907	7 E VII, cap.50,
C.A.1908	8 E VII, cap.69,
C.A.1928	18 and 19 G V, cap.45,
C.A.1929	19 and 20 G V, cap.23,
C.A.1948	11 and 12 G VI, cap. 38.

Miscellaneous Provisions as to Share Capital ¹.

S.59.

A company, if so authorised by its articles ² (as originally framed or as altered by special resolution) ³, may do any or more of the following things, (namely) ⁴ -

- (a) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares ;
- (b) accept from any member the whole or a part of the amount remaining unpaid on any shares held by him, although no part of that amount had been called up ;
- (c) pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some share than on others.

1867, S.24 ⁵
1908, S.39.
1929, S.48.

S.60.

A limited company may by special resolution determine ⁶ that any portion of its share capital which has not been already called up shall not be capable of being called up except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital shall not be capable of being called up except and for the purposes aforesaid.

1879, S.5.
1908, S.59 ⁷
1929, S.49.

-
1. The former heading was : " Power of company to arrange for different amounts being paid on shares". Cf. C.A.1908, S.39.
 2. The Companies Acts 1862, 1867 and 1877 used instead of "articles" the older expression "Regulations". Cf. e.g. C.A.1862, S.12, C.A.1867, Ss.9,21,24, and C.A.1877, S.5.
C.A.1900, S.29 used already the new word "articles".
 3. Cf. e.g. C.A.1862, S.12, C.A.1867, S.24, C.A.1877, S.5, C.A.1900, S.29. These words were omitted later.
 4. Cf. C.A.1867, S.24, C.A.1908, S.39. This word was omitted later.
 5. Though this section had a different preamble its context corresponded to pts.a - c of later Companies Acts.
 6. C.A.1879, S.5 (4) used instead of "determine" the word "declare". There was, besides, an unimportant difference in the last part of this section.
 7. This section had its own heading: " Reserve liability of limited company".

S.61.

(1) A company limited by shares (or a company limited by guarantee and having a share capital ¹, if so authorised by its articles ² (as originally framed or as altered by special resolution) ³, may alter the conditions of its memorandum as follows, that is to say, it may -

- (a) increase its share capital by new shares of such amount as it thinks expedient ;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;
- (c) convert all or any of its paid-up shares into stock, (and reconvert that stock into paid-up shares of any denomination ⁴ ;
- (d) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each (reduced share shall be the same as it was in the case of the share from which the reduced share is derived ⁵ ;
- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

1. C.A.1928, S.12 (a). This reference is not to be found in the text of C.A.1908, S.41 (1), and prior to that.

2. Cf. supra p. A 2, footnote 2.
Companies regulated by Table A are authorized by Art.44 (C.A.1949, Table A, cf. infra p. A 17 and footnotes) to increase their capital.

3. Cf. supra p. A 2, footnote 3.

4. The possibility of a reconversion of stock into shares was mentioned for the first time in the C.A.1900, S.29.

5. C.A.1867, S.21, ended this way : " ... share of reduced amount shall be the same as it was in the case of the existing share or shares ~~which~~ ^{from} the share of reduced amount is derived".

- A.1867, S.21 (2) The powers conferred by this section must be exercised by (the
A.1908, S.41 (2) company in general meeting ¹.
A.1929, S.50 (2)
- A.1877, S.5 (3) A cancellation of shares in pursuance of this section shall not be
A.1908, S.41 (4) deemed to be a reduction of share capital within the meaning of this
Act.

S.62.

(1) If a company having a share capital has -

- (a) consolidated and divided its share capital into shares of larger
amount than its existing shares ; or
(b) converted any shares into stock ; or
A.1908, S.42 (c) re-converted stock into shares ; or
(d) subdivided its shares or any of them ; or
(e) redeemed any redeemable preference shares ; or
(f) cancelled any shares, otherwise than in connection with a reduction
of share capital under section sixty-six of this Act ;

it shall within one month after so doing give notice thereof to the
registrar of companies specifying, as the case may be, the shares

consolidated, divided, converted, sub-divided, redeemed or cancelled,

or the stock reconverted.

(2) If default is made in complying with this section, the company and

every officer of the company who is in default shall be liable to
a default fine.

1. C.A.1908, S.41, had the following text : " The powers conferred by this section
with respect of subdivision of shares must be exercised by special resolution".
Similarly, C.A.1867, S.21, concerned only to the case mentioned in pt. "d" of the
present S.61.

2. This section did n o t mention pt. "d" of the present text("Subdivided its shares
or any of them"). This was put in for the first time by the C.A.1929, S.51 (1)(d).

3. The penalty clause of the previous Acts was much more complicated.
Cf. e.g. C.A.1928, S.14 (2).

S.63.

(1) Where a company having a share capital, whether its shares have or have not been converted into stock, has increased its share capital beyond its registered capital, (and where a company not having a share capital has increased the number of its members beyond the registered number)¹ it shall (within fifteen days after the passing of the resolution authorising the increase, give to the registrar of companies² notice of the increase (of capital or members)³ and the registrar shall record the increase.

(2) The notice to be given as aforesaid shall include such particulars as may be prescribed with respect to the classes of shares affected and the conditions subject to which the new shares have been or are to be issued, and there shall be forwarded to the registrar of companies together with the notice a printed copy of the resolution authorising the increase.

(3) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a default fine.

1. Cf. C.A.1908, S. 44 (1). See below footnote 2.

2. The text of C.A.1908, S.44, was as follows :

" ... give to the registrar of companies in the case of an increase of share capital, within fifteen days after the passing, or in the case of a special resolution the confirmation of the resolution authorising the increase, and in the case of an increase of members within fifteen days after the increase was resolved on or took place ...".

It was later much simplified through the omission of the phrase "increase of the number of members", and the replacement of a "special resolution" by the normal procedure in general meeting. Cf. C.A.1929, S.50, and W.Annan, An arrangement of the Companies (Consolidation) Act, 1908, Edinburgh 1928, p.27.

3. Cf. C.A.1908, S.44.

These words (similarly to the above mentioned : "and where a company not having ..") were omitted later.

4. This section mentioned a fine "not exceeding five pounds for every day during which the default continues". This system of fines was simplified later. C.A.1929, S.52 (3)

Reduction of Share Capital.

S.66.

(1) Subject to confirmation by court, a company limited by shares (or a company limited by guarantee and having a share capital ² may, if so authorised by its articles ³ (as originally framed or as altered by special resolution) ⁴, by special resolution reduce its share ⁵ capital in any way, and in particular, without prejudice to the generality of the foregoing power, may -

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up ; or

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets ;

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company ;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

-
1. The heading in the C.A.1867 was as follows : "Reduction of Capital and Shares".
 2. C.A.1929, S.55 (1). This passage was unknown before.
 3. Cf. supra p. A 2, footnote 2.
 4. Cf. supra p. A 2, footnote 3.
 5. C.A.1908, S.51 (1). This word "share" was introduced only in the C.A.1900, S.4 (1)(6) and in the C.A.1907, S.1 (3)(b). Simonson (2nd ed., London 1924, p.17) considered it as a novelty of the C.A.1908. He apparently did not notice the appearance of the expression "share capital" in the texts of 1900 and 1907. Cf. P.F.Simonson, The Companies Acts 1900 and 1907 with Commentaries, London 1908, pp. 15-16 and p.98.
 6. The text of C.A.1867, S.9, differs from that of C.A.1908, S.46, though the content is almost the same.
 7. The text of C.A.1877, S.3, was as follows : " The word "capital" as used in the Companies Act, 1867, shall include paid-up capital; and the power to reduce capital conferred by that Act shall include a power to cancel any lost capital, or any capital unrepresented by available assets, or to pay off any capital which may be in excess of the wants of the company ; and paid-up capital may be reduced either with or without extinguishing or reducing the liability (if any) remaining on the shares of the company, and to the extent to which such liability is not extinguished or reduced, it shall be deemed to be preserved notwithstanding anything contained in the Companies Act, 1867". Cf. R.R.Formoy, The historical foundations of Modern Company Law, London 1923, p.137.

1867, S. 9. (2) A special resolution under this section is in this Act referred to
 1908, S.46¹ as " a resolution for reducing share capital".
 1929, S.55.

S.67.

1867, S.11² (1) Where a company has passed a resolution for reducing share³ capital,
 1908, S.47. it may apply to the court (by petition)⁴ for an order confirming the
 1929, S.56 (1) reduction.

(2) Where the proposed reduction of share³ capital involves either
 diminuation of liability in respect of unpaid share capital or the payment
 to any shareholder of any paid-up share capital, and in any other case if
 the court so directs, (the following provisions shall have effect, subject
 nevertheless to the next following subsections : -

(a)⁵ every creditor of the company who at the date fixed by the court is
 1877, S. 4⁶ entitled to any debt or claim which, if that date were the commence-
 1908, S.49 (1) ment of the winding up of the company, would be admissible in proof
 1929, S.56 (2) against the company, shall be entitled to object to the reduction ;
 1948, S.67 (2)

-
1. The wording of this section differs slightly from the present one.
 2. The second part of this section became later S.50 of C.A.1908.
 Cf. infra p. A 9.
 3. Cf. supra p. A 6, footnote 5.
 4. Cf. C.A. 1867, S.11, C.A.1908, S.47, and C.A.1929, S.56 (1). These two words were
 omitted in the text of C.A.1948, S.67.
 5. Cf. C.A. 1929, S.56 (2). This passage was unknown before, so was the subdivision of
 this subsection (2) into smaller units (a - c, i and ii).
 6. C.A.1877, S.4 (first part) had the following text : " P~~r~~ovided that where the
 reduction of the capital of a company does not involve either the diminuation of
 any liability in respect of unpaid capital or the payment to any shareholder of
 any paid-up capital,
 (1) The creditors of the company shall not, unless the Court otherwise direct, be
 entitled to object or required to consent to the reduction, and
 (2) It shall not be necessary before the presentation of the petition for confirming
 the reduction to add, and the Court may, if it thinks it expedient so to do, dis-
 pense altogether with the addition of the words "and reduced" as mentioned in
 the Companies Act, 1867".

(b) the court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction ;

(c) where a creditor entered on the list whose debt or claim is not discharged or (has not ¹ determined does not consent to the (proposed)² reduction, the court may, if it thinks fit, dispense with the consent (of that creditor, on the company securing payment of his debt or claim by ³ appropriating, as the court may direct, the following amount (that is to say) ⁴

(i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim ;

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the court after the like inquiry and adjudication as if the company were being wound up by the court.

(3) Where a proposed reduction of share capital involves either the diminuation of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the court may, if, having regard to any special circumstances of the case, it thinks proper to do, direct that subsection (2) of this section shall not apply as regards any class or any classes of creditors.

1. C.A.1929, S.56 (2)(c). These two words were inserted only then.

2. C.A.1867, S.14. This word was omitted later.

3. C.A.1908, S.49 (3). The older corresponding text was much more complex.

4. C.A.1908, S.49 (3). These words were omitted later.

S.68.

(1) The court, if satisfied, with respect to every creditor of the company who under (the last foregoing section ¹ is entitled to object to the reduction, that either his consent to the reduction has been obtained or his

1867, S.11 (2)² debt or claim has been discharged or has determined, or has been secured,
1908, S.50. may make an order confirming the reduction on such terms and conditions as
1929, S.57 (1) it thinks fit.

1867, S.10 ³ (2) Where the court makes any such order, it may ⁴ -

1877, S.4 (1)⁵ (a) if for any special reason it thinks proper so to do, make an order
1908, S.48 ⁶ directing that the company shall, during such period, commencing on
1928, S.19. or at any date after the date of the order, add to its name as the
1929, S.57 (2)(a) last words thereof the words "and reduced", and

1. Cf. C.A. 1929, S.57 (1). The former text was simply : " ... this Act". Cf. C.A.1908, S.50.

2. Cf. supra p. A 7, footnote 2.

3. The text of this section is given below in footnote 4.

4. Prior to 1928 the text of this section differed owing to the then existing principle of the compulsory character of the addition of these words "and reduced".

The text of C.A.1867, S.10, was as follows: " The company shall, after the date of the passing of any special resolution for reducing its capital, add to its name, until such date as the court may fix, the words "and reduced" as the last words in its name, and those words shall, until such date, be deemed to be part of the name of the company within the meaning of the Principal Act".

C.A.1877, S.4, allowed the first exception to this rule. The text of this section is given above on p. A 7, footnote 6.

C.A.1908, S.48, modified its text as follows : " On and from the confirmation by a company of a resolution for reducing share capital, or where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from presentation of the petition for confirming the reduction, the company shall add to its name, until such date as the court may fix, the words "and reduced", as the last words in its name, and those words shall, until that date be deemed to be part of the name of the company : Provided that, where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the court may, if it thinks expedient, dispense altogether with the addition of the words "and reduced"."

5. The text of this section is given above on p. A 7, footnote 6. It was partly later built in into the beginning of the second half of S.48 of the C.A.1908.

6. The text of this section is given above in footnote 4.

(b) make an order requiring the company (to publish as the court directs
 A.1877, S.4 (2) the reasons for reduction or such other information in regards thereto
 A.1908, S.55¹ as the company may think expedient with a view to giving proper in-
 A.1929, S.57 (2)² formation to the public, and if thinks fit, the causes which led to
 the reduction².

(3) Where a company is ordered to add to its name the words "and reduced",
 A.1908, S.48(1)³ those words shall, until the expiration of the period specified in the
 A.1929, S.57 (3) order, be deemed to be part of the name of the company.

S.69.

(1) The registrar of (joint stock)⁴ companies, on production to him of an
 order of the court confirming the reduction of the share⁵ capital of the
 company, and the delivery to him of a copy of the order and of a minute ap-
 proved by the court showing, with respect to the share capital of the company
 as altered by the order, the amount of the share capital, the number of shares
 into which it is to be divided, and the amount of each share, (and the amount,
 if any, at the date of the registration deemed to be paid up on each share⁷,
 shall register the order and minute.

(2) On the registration (of the order and minute⁸, (and not before⁹, the
)special)¹⁰ resolution for reducing share capital as confirmed by the order
 so registered shall take effect.

1. This section started as follows : " In any case of reduction of share capital, the court may require the company ... " . The remainder of this section was later built in to C.A. 1929, S.57 (2)(b).

2. This part of the sub-section 57 (2)(b) was taken from S.55 of the C.A.1908.

3. The text of this section is given above on p. A 9, footnote 4 (last part). Altering the principle of the compulsory addition of the words "and reduced", only the last part of the first paragraph of S.48 (C.A.1908) could be used for S.57 (3) of C.A.1929.

Cf. W.Annan, An arrangement of the Companies (Consolidation) Act 1908, pp.31-32.

4. C.A.1867, S.15. The words "joint stock" were omitted already in the C.A.1877.

5. Cf. supra p. A 6, footnote 5.

7. Cf. C.A.1908, S.51. These words were introduced only then.

8. Cf. C.A.1929, S.58 (2). These words were introduced only then.

9. Cf. C.A.1908, S.51. These words were not previously included.

10. Cf. C.A.1867, S.15. This word was omitted later.

(3) Notice of the registration shall be published in such manner as the court may direct.

(4) The registrar shall certify under his hand the registration of the order and minute, and his certificate shall be conclusive evidence that all

1867, Ss. 9, 15. the requirements of this Act with respect to reduction of share ¹ capital
1908, S. 51 (1-4) have been complied with, and that the share capital of the company is such
1929, S. 58 (1-4) as is stated in the minute.

(5) The minute when registered shall be deemed to be substituted for the corresponding part of the memorandum and shall be valid and alterable as if
1867, S. 16. it had been originally contained therein.
1908, S. 52 (1) ²
1929, S. 58 (5)

(6) The substitution of any such minute as aforesaid for part of the memorandum of the company shall be deemed to be an alteration of the memorandum within the meaning of section twenty-five of this Act.

S. 70.

(1) (In the case of a reduction of share capital ³ a member of the company, past or present, shall not be liable in respect of any share to any
1867, S. 16 (2) call or contribution exceeding in amount the difference, if any, between the
1908, S. 53 (1) amount (of the share as fixed by the minute and the amount ⁴ paid, or (as
1929, S. 59 (1) the case may be) ⁵ the reduced amount, if any, which is to be deemed to have
been paid, on the share, (as the case may be ⁵;

1. Cf. supra p. A 6, footnote 5.

2. This sub-section continued as follows : " ... and must be embodied in every copy of the memorandum issued after its registration".

3. C.A. 1929, S. 59 (1). This initial phrase was unknown before.

4. C.A. 1929, S. 59 (1). These words were, though in a slightly different form, in the C.A. 1867, S. 16 (last part). In the C.A. 1908, S. 53, they were at the end of this sub-section.

5. C.A. 1908, S. 53. These words were later transferred to the end of this paragraph. Cf. Sch. III of the C.A. 1907 (amendment to S. 16 of C.A. 1867).

Provided that, if any creditor, entitled in respect of any debt or claim to object to the reduction of share ¹ capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect to his claim, not entered on the list of creditors, and, after the reduction, the company is unable, within the meanings of the provisions of this Act with respect to winding up by the court, to pay the amount of his debt or claim, then -

(a) ² every person who was a member of the company at the date of the registration of the order for reduction and minute, shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before ⁽ the said date ³; and

(b) if the company is wound up, the court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

1. Cf. supra p. A 6, footnote 5.

2. C.A.1908, S.53, called these subdivisions "(1)" and "(2)". They were unknown before. Cf. C.A.1867, S 17.

3. A slightly different text is in the C.A.1908, S.53 (1).

S.71.

If any officer of the company ¹-

- (a) wilfully conceals the name of any creditors entitled to object to the reduction ; or
- (b) wilfully misrepresents the nature or amount of the debt or claim of any creditor ; or (if any director or manager of the company) ²
- (c) aids, abets or is privy to any such concealment or misrepresentation as aforesaid, (every such director, manager or officer) ² he shall be guilty of a misdemeanour.

C.A.1867, S.19

C.A.1908, S.54

C.A.1929, S.60

Variation of Shareholders' Rights.

S.72.

(1) If, in the case of a company the share capital is divided into different classes of shares, provision is made by the memorandum or articles for authorising the variation of the rights attached to any class of shares in the company, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and in pursuance of the said provision the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than fifteen per cent. of the issued shares of that class, being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the court to have variation cancelled, and, where any such application is made, the variation shall not have effect unless and until it is confirmed by the court.

(2) An application under this section must be made within twenty one days ³ after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their numbers as they may appoint in writing for the purpose.

1. The preamble was different in C.A.1867 (s.19) and C.A.1908 (S.54): "If any director, manager, or officer of the company". Later (C.A.1929, S.60) this formula was changed to : " secretary or other officer", and has now shrunk to a mere "any officer".

2. These words were omitted after 1908.

The subdivision of this section (a-c) was not made in C.A.1908, nor prior to that.

3. Formerly : " within seven days". Cf. C.A.1929, S. 61 (2).

(3) On any such application the court, after hearing the applicant and any other persons who apply to the court to be heard and appear to the court to be interested in the application, may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation and shall, if not so satisfied, confirm the variation.

(4) The decision of the court on any such application shall be final.

(5) The company shall within fifteen days after the making of the order by the court on any such application forward a copy of the order to the registrar of companies, and, if default is made in complying with this provision, the company and every officer of the company who is in default shall be liable to a default fine.

(6) The expression "variation" in this section includes abrogation and the expression "varied" shall be construed accordingly.

1928, S.17,
1929, S.61.

Arrangements and Reconstructions¹.

S.206.

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them², the court may on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

1. Formerly : " Power to compromise". Cf. C.A.1908, S.120.

2. Cf. C.A.1900, s.24, and C.A.1907, s.38.

Cf. P.F.Simonson, The Companies Acts 1900 and 1907, London 1908, pp.76-77 and pp. 194-196.

(2) If a majority in number representing three fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present (and voting ¹ either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and

C.1908, S.120 (1-2) ² also on the company, or, in the course of being wound up, on the

C.1929, S.153 (1-2) liquidator and contributories of the company.

(3) An order made under subsection (2) of this section shall have no effect until an office copy of the order has been delivered to the registrar of companies for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3) of this section, the company and every officer of the company who is in default

C.1928, S.53 (2) shall be liable to a fine not exceeding one pound for each copy in respect

C.1929, S.153 (3-4) of which default is made.

(5) An order under subsection (1) of this section pronounced in Scotland by the judge acting as vacation judge in pursuance of section four of the Administration of Justice (Scotland) Act, 1933, shall not be subject to review, reduction, suspension or stay of execution ³.

1. Cf. C.A.1929, S.153 (2). These words "and voting" were unknown before.

2. Cf. 33 and 34 Vict. (1870), cap.104, S.2.

3. Cf. 23 and 24 Geo V (1933), cap.41.

(6) In this (and in the next following ¹ section the expression "company" means any company liable to be wound up under this Act, (and the expression "arrangement" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods ².

C.A.1908, S.120 (3)

C.A.1928, S. 53 (1)

C.A.1929, S.153 (5)

1. These words were not inserted in the C.A.1929, and prior to that.

2. Cf. C.A.1928, S.53 (1) and C.A.1929, S.153 (5).

This part of the section was transferred here in 1928. The corresponding text of the C.A.1908, S.45 (1), was as follows : " A company limited by shares may, by special resolution confirmed by an order of the court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes :

Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class."

Table A (First Schedule).

Alteration of Capital.

Art.44.

The (company may from time to time by ordinary resolution ¹ increase the share capital by such sum to be divided into shares of such amount, as the resolution shall prescribe.

C.A.1908, Table A, Art.41.

C.A.1929, Table A, Art.34.

C.A.1929, Table A, Art.35) ²

1. Cf. C.A.1929, Table A, Art. 34.

In the First Schedule of the C.A.1862, and in the Table A of the C.A.1908 the text of this article began as follows : " The directors may, with the sanction of an extraordinary resolution of the company ...". An "extraordinary resolution" was meant to be passed by a majority of not less than three quarters of such members of the company for the time being entitled to vote as may be present in person or by proxy.

Cf. C.A.1862, Ss.129 and 51, and First Sch., Art.26 ; and C.A.1908, Table A, Art.41. See also P.F.Simonson, The Revised Table A, London 1907, pp.37 ff.

2. This article concerning the pre-emptive rights of shareholders was as follows :

"Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot in the opinion of the directors, be conveniently offered under this article".

C.A.1862, First Schedule, Art. 27, served as a prototype to the first two sentences of this article. The corresponding article of C.A.1908, Table A, began on a slightly different line : " Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital ...". C.A.1862, First Schedule Art. 27, referred simply to the " ... members in proportion to the existing shares held by them ..." .

C.A.1929, Table A, Art.36)¹

Art.45.

The company may by ordinary² resolution -

- (a) consolidate and divide (all or any of³ its share capital into shares of larger amount than its existing shares ;
- (b) sub-divide its existing shares, or any of them into shares of smaller amount than is fixed by the memorandum of association subject, nevertheless, to the provisions of section 61 (1)(d) of the Act⁴;
- (c) cancel any shares which, at the date of the passing of the resolution,

A.1908, Table A, Art.44. have not been taken or agreed to be taken by any person.

A.1929, Table A, Art.37.

Art.46.

The company may by special resolution reduce its share capital, (any capital redemption reserve fund⁵ (or any share premium account⁶ in any manner and with, and subject to, any incident authorised, and consent required, by law.

A.1908, Table A, Art44 (d)

A.1929, Table A, Art.38.

-
1. This article (identical with Art.43 of Table A of the C.A.1908) was as follows :
"The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture, and otherwise as the shares in the original share capital".

Both these articles (35 and 36) were omitted in the Table A of the C.A.1948. The Companies Act (Northern Ireland) 1932, 22 and 23 Geo V, cap.7, 1st Schedule, Table A, Art. 35 and 36, have analogous provisions in this respect. To the writer's knowledge, this has not been repealed since.

- 2. C.A.1908, Table A, Art. 44 : " ... by special resolution".
- 3. These words were not previously included. They were put in for the first time by the C.A.1929. Cf. P.F.Simonson, The Revised Table A, London 1907, p.40.
- 4. A slight difference with the text of C.A.1908, Table A, Art.44 (b).
- 5. Cf. C.A.1929, Table A, Art.38. This phrase had not previously appeared.
- 6. Cf. C.A.1948, Table A, Art.46. This part of the text had no mention of a share premium account prior to that.

A N N E X II.

E x t r a c t s f r o m
 O R D E R L III B,
 R.S.C. (Companies)(No.2),1948.
P r o c e d u r e o n A p p l i c a t i o n
u n d e r t h e C o m p a n i e s A c t , 1948.

Rule 2.

Every petition (except a petition specified in Rule 5 (h))... to which this Order relates shall be brought to and issued out of the office of the Registrar Companies Court but every petition specified in Rule 5 (h) ... may at the option of the applicant or petitioner be brought to and issued out of either (a) such office or department as is specified in Order II, r.9, or (b) the office of the Registrar Companies Court ...

Rule 5.

The following applications shall be made by petition : -

- ... (d) Applications to confirm a reduction of capital under section 67 of the Act,
- (e) Applications to confirm the reduction of any share premium account or any capital redemption reserve fund under section 56 (1) or section 58 (1)(d) of the Act,
- (f) Applications to cancel any variation of the rights of holders of special classes of shares under section 72 of the Act,
- (g) Applications to sanction the issue of shares at a discount under section 57 of the Act,
- (h) Applications to sanction a compromise or arrangement under s.206 (2) of the Act

Rule 8.

The following applications shall be made by summons : -

- (g) Applications for meetings of creditors or members of a company under section 206 (1) of the Act,
- (h) Applications for facilitating reconstructions or amalgamations of companies under section 208 of the Act, where the matters to which such applications relate have not been dealt with, or fully dealt with, on the hearing of the petition to sanction the compromise or arrangement to which they relate, ...
- (m) Applications to extend the time for the issue of shares at a discount under section 57 (1)(d) of the Act, ...
- (o) Applications for the purpose of preventing or settling the terms of the acquisition of shares under section 209 of the Act, ...

Rule 10.

(1) When the petition has been presented pursuant to paragraphs (a)(b)(c)(d)(e)(f) or (j) of Rule 5 of this Order, or where an order is sought under section 208 of the Act, an application shall in every case be made by summons in Chambers to the Judge for directions as to the proceedings to be taken.

(2) Upon the hearing of the summons, or upon any adjourned hearing or hearings thereof or any subsequent application, the Judge may make such order or orders and give such directions as he may think fit to all the proceedings to be taken, and more particularly with respect to the following matters, that is to say -

- (a) the publication of notices,
- (b) in cases where the Court orders an inquiry as to the debts, claims or liabilities of or affecting a company or as to any such debts, claims or liabilities, the proceedings to be taken for settling the list of creditors entitled to object, including the dispensing with the observance of section 67 (2) of the Act as regards any class or classes of creditors ; fixing the date with reference to which the list of such creditors is to be made out, and generally fixing a time for and giving directions as to all other necessary or proper steps in the matter whether expressly mentioned in any of the Rules of this Order or not

Rule 11.

In cases where the Court has ordered any such inquiry as aforesaid the following provisions shall apply : -

- (a) The company shall, within seven days after such order or such further or other time as the Judge may allow, file in the office of the Registrar, an affidavit made by some officer or officers of the company competent to make the same, verifying a list containing so far as possible the names and addresses of the creditors of the company to whom such inquiry extends. The said list shall also contain the amounts due to the creditors therein named respectively in respect of debts, claims or liabilities to which the inquiry extends, or in the case of any such debt payable on a contingency or not ascertained or any such claim admissible to proof in a winding up of the company the value, so far as can be justly estimated, of such debt or claim. Every such list and an office copy of every such affidavit shall be left at the office of the Registrar not later than one day after the filing of the affidavit.
- (b) The person making any such affidavit shall state therein his belief that the list verified by such affidavit is correct, and that there was not at the date so fixed as aforesaid any debt, claim or liability which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, except the debts, claims and liabilities set forth in such list and any debts, claims and liabilities to which the inquiry does not extend, and shall state his means of knowledge of the matters deposed to in such affidavit ...
- (c) Copies of such list ... shall be kept at the registered office of the company and at the offices of the solicitors to the company and their London agents (if any) and any person desirous of inspecting the same may at any time during the ordinary hours of business inspect and take extracts from the same ...

- (d) The company shall within seven days after the filing of such affidavit, or such further or other time as the Judge may allow, send to each creditor whose name is entered in the said list a notice stating the amount of the proposed reduction of capital, the effect of the order directing the inquiry and the amount or estimated value of the debt or the contingent debt or claim or both for which such creditor is entered in the said list, and the time (such time to be fixed by the Judge) within which, if he claims to be entitled to be entered on such list as a creditor for a larger amount, he must send in his name and address, and the particulars of his debt or claim, and the name and address of his solicitors (if any) to the solicitors of the company ...
- (e) Notice of the presentation of the petition, of the effect of the order directing the inquiry and of the list of creditors shall, after the filing of the affidavit mentioned in paragraph (a) of this Rule, be published at such times, and in such newspapers as the Judge shall direct. Every such notice shall state the amount of the proposed reduction of capital, and the places where the aforesaid list of creditors may be inspected, and the time within which creditors of the company who are not but are entitled to be entered on the said list, and are desirous of being entered therein, must send in their names and addresses, and the particulars of their debts or claims, and the names and addresses of their solicitors (if any) to the solicitor of the company ...
- (f) ... Such affidavit shall also state which of the persons who are entered in the list as creditors and which of the persons who have sent in particulars of their debts or claims in pursuance of such notices as aforesaid have been paid or have consented to the proposed reduction ...
- (g) If the company contends that a person is not entitled to be entered in the list of creditors in respect of any debt or claim whether admitted or not or if any debt or claim ... shall not be admitted by the company at its full amount, then and in every such

case, unless the company is willing to appropriate in such manner as the Judge shall direct the full amount of such debt or claim, the company shall, if the Judge think fit so to direct, send to the creditor a notice that he is required to come in and establish his title to be entered on the list ...

- (i) The result of the settlement of the list of creditors shall be stated in a certificate by the Registrar and such certificate shall state what debts or claims (if any) have been disallowed, and shall distinguish the debts or claims the full amount of which the company is willing to appropriate, and the debts or claims (if any) the amount of which has been fixed by inquiry and adjudication in manner provided by section 67 (2) of the Act, and this order, and the debts or claims (if any) the full amount of which the company does not admit or is not willing to appropriate or the amount of which has not been fixed by inquiry and adjudication as aforesaid; and shall show which of the creditors have consented to the proposed reduction, and the total amount of the debts due to them, and the total amount of the debts or claims the payment of which has been secured in manner provided by section 67 (2) of the Act and the persons to or by whom the same are due or claimed. The said certificate shall also state what creditors have under paragraph (g) of this Rule come in and sought to establish their title to be entered on the list and whether such claims have been allowed or not, but it shall not be necessary to make in such certificate any further or other reference to any creditors who are not entitled to be entered in the list or to any debts or claims to which the inquiry does not extend or to show therein the several amounts of the debts or claims of any person who have consented to the proposed reduction or the payment of whose debts or claims has been secured as aforesaid ...
- (1) Before the hearing of the petition, notices stating the day on which the same is appointed to be heard shall be published at such times and in such newspapers as the Judge shall direct ...

ANNEX III.

List of American corporation statutes.

Alabama Code 1907 (s.3447), Code 1940,
 Arizona Code 1939,
 Arkansas General Corporation Act 1904 (s.855), 1931 (s.255),
 California Code Civil 1907, amended 1931, 1947, 1951, 1953,
 Colorado Revised Statutes 1908, 1921, 1935, 1943,
 Connecticut Public Acts 1903 (c.194), 1907 (c.155), General Corporation Statutes
 1930,
 Delaware General Corporation Acts 1901, Code 1915, amended 1929 (c.135),
 1931 (c.129), revised 1935, Code 1953,
 Florida Act 1927, General Statute Law 1953 (s.2653),
 Georgia Code 1910 (s.2822), Code 1933,
 Idaho Code 1932 (t.29),
 Illinois Business Corporation Act 1933,
 Indiana General Corporation Act 1929 (c.215), amended 1949, 1950, 1953,
 Iowa Code 1931, Code 1950,
 Kansas General Statutes 1909 (s.1746), 1923 (c.17), 1939,
 Kentucky Statutes 1909 (s.2161), Act 1942, revised 1948,
 Louisiana Act 1928 (c.258), Revised Statutes 1950,
 Maine Revised Statutes 1907 (c.47), 1930 (c.56), 1951,
 Maryland Revised Corporation Act 1908, amended 1924, 1953,
 Massachusetts Business Corporation Law 1903, amended 1937,
 Michigan Corporation Acts 1900, 1903 (c.2), 1907, 1931 (c.327), 1933 (c.186),
 1935, 1951 (c.239),

Minnesota	Revised Law 1905 (s.2849), Business Corporation Act 1933 (s.300),
Mississippi	Code 1930,
Missouri	Revised Statutes 1939, Law 1943,
Montana	Code 1909 (s.3349), revised 1931 (cc.33, 35),
Nebraska	Statutes 1929 (c.24),
Nevada	Law 1937,
New Hampshire	Code 1907 (c.129), revised 1925 (c.227),
New Jersey	General Corporation Acts 1896, 1906, 1910, 1911, 1930 (t.47), 1953,
New Mexico	Statutes 1929 (c.32),
New York	General Corporation Acts 1910, 1911, 1912, Stock Corporation Laws 1944, 1952,
North Carolina	Code 1943,
North Dakota	Code 1905 (s.4195), 1931 (s.114), 1941,
Ohio	New Ohio Corporation Act 1927, Code 1953, General Corporation Act 1955,
Oklohama	Business Corporation Act 1947,
Oregon	Business Corporation Act 1951,
Pennsylvania	Acts 1933 (c.106), 1937 (P.L.2828), amended 1939, 1941, 1949, 1951,
Rhode Island	Acts 1909, 1923 (c.248), 1932 (c.1941), 1938, 1948,
South Carolina	Civil Code 1902, amended 1932,
South Dakota	Act 1929,
Tennessee	Code 1903 (s.2335),
Texas	Act 1925,
Utah	Code 1907 (s.335), amended 1933,
Vermont	Public Statutes 1906, 1910, 1934,
Virginia	Code 1930,
Washington	Code 1933 (c.185), revised 1937, 1939, 1941, 1947, 1949, 1952,
West Virginia	Code 1932 (c.31), Code 1943,
Wisconsin	Statutes 1905, 1911, 1933, 1949 (c.182), 1951 (c.731), 1953,
Wyoming	Code 1931 (c.28).

A N N E X I V .

B i b l i o g r a p h y .

This bibliography is, of course, unable to include all the works connected with this subject.

The first part of this bibliography contains all books and articles actually consulted and quoted in the course of this study, the second part lists further literature from which I have not drawn material, and the third part gives the titles of periodicals containing articles quoted here.

Works repeatedly quoted in this study are usually referred to only by the author's name. A list of such works is given on pp. 2 - 5. A mention of these abbreviations is given in this bibliography as well (in brackets at the end of the title). The titles of all other works are usually fully quoted, except when repeated on the same or the following page.

Anonymous articles, and articles only bearing initials in periodicals and collective works and other minor contributions are not mentioned in this bibliography although they may be mentioned in footnotes.

The titles of articles in periodicals and collective works are denoted with inverted commas, and so also are the unabridged titles of periodicals and collective works. The list of abbreviations for periodicals is given on p. 6, and is also appended here at the end of this bibliography (p. A 67). Collections in honour of a person appear under that person's name, and other collective works under the name of their editor. Their names are bracketed.

If there is more than one publishing place mentioned on the title page of the work, only the first is mentioned here. The place and year of publication of a work may be omitted if it is consecutively quoted on the pages of the same chapter. If there is no year of publication apparent on the title page, the abbreviation "s.a." is appended in brackets, and an approximate year of publication is sometimes supplied.

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P a r t II.

Special abbreviations :

B - Berlin, L - London, NO - New Orleans, R - Rome,
 C - Chicago, M - Munich, NY - New York, Z - Zurich.
 E - Edinburgh, P - Paris, W - Washington.
 in connection with the titles of periodicals :
 J - Journal, L - Law, Q - Quarterly, R - Review.

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P a r t III .

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"Accounting Research",	Cambridge 1948 ff.,
"Albany Law Journal",	Albany 1870 - 1908,
"American Bar Association Journal",	Chicago 1915 ff.,
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"American Law Review",	Boston 1866 - 1929,
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"Bulletin de la Societ� de Legislation Compar�e",	Paris 1872 - 1948,
"California Law Review",	Berkeley 1912 ff.,
"Cambridge Law Journal",	London 1921 ff.,
"Columbia Law Review",	New York 1901 ff.,
"Comparative Law Series",	Washington 1938 ff.,
"Cornell Law Quarterly",	Ithaca 1915 ff.,
"Economic History",	London 1926 ff.,
"Economic History Review",	London 1927 ff.,
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"International and Comparative Law Quarterly",	London 1952 ff.,
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"Juridical Review",	Edinburgh 1889 ff.,
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"Texas Law and Legislation",	Dallas 1947 - 1948,
"Time and Tide",	London 1920 ff.,
"Tulane Law Review",	New Orleans 1916 ff.,

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"Zeitschrift für ausländisches und internationales Privatrecht",	Berlin 1927 ff.,
"Zeitschrift für das gesamte Handels- und Konkursrecht",	Stuttgart 1858 ff.,
"Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Germanistische Abteilung",	Weimar 1880 ff.,
"Zeitschrift für schweizerisches Recht",	Basle 1852 ff.

Abbreviations used for periodicals¹ :

CLR	Columbia Law Review, New York,
G	Gruchots Beiträge zur Erläuterung des deutschen Rechts, Berlin,
HLR	Harvard Law Review, Cambridge (Mass.),
ICLQ	International and Comparative Law Quarterly, London,
J	Journal (in connection with titles of periodicals),
JCL	Journal of Comparative Legislation and International Law, London,
L	Law (in connection with titles of periodicals),
LQR	Law Quarterly Review, London,
MLR	Modern Law Review, London,
Q	Quarterly (in connection with titles of periodicals),
R.	Review (in connection with titles of periodicals),
SLR	Scottish Law Review, Glasgow,
SLT	Scots Law Times, Edinburgh,
TLR	Tulane Law Review, New Orleans,
YLJ	Yale Law Journal, New Haven,
ZHR	Zeitschrift für das gesamte Handels- und Konkursrecht, Stuttgart,
ZsAIP	Zeitschrift für ausländisches und internationales Privatrecht, Berlin,
ZSR	Zeitschrift für schweizerisches Recht, Basle.

1. Cf. supra p. A 53.

A N N E X V .

L i s t o f c a s e s .

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